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IN THE

Supreme Court of the United States

October Term, 1955

No. 782

WILLIAM O. ROYALTY, GEORGE SLAUGHTER, and LOCAL NO. 429 of the HOTEL and RESTAURANT EMPLOYEES and BARTENDERS INTERNATIONAL UNION,

Petitioners,

vs.

HARRY CHUCALES, GUS CHUCALES, and LULA CHUCALES, dba "State Bar and Grill",

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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No. ————

WILLIAM O. ROYALTY, GEORGE SLAUGHTER, and LOCAL NO. 429 of the HOTEL and RESTAURANT EMPLOYEES and BARTENDERS INTERNATIONAL UNION,

Petitioners,

vs.

HARRY CHUCALES, GUS CHUCALES, and LULA CHUCALES, dba "State Bar and Grill",

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners herein pray that a Writ of Certiorari be issued to review the judgment and decree of the Supreme Court of Ohio dated October 26, 1955.

THE OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported as follows: *Chucales, et al., d.b.a. State Bar and Grill, Appellees,* v. *Royalty, et al., Appellants,* 164 O.S. 214,—NE (2d) — and appears in the Appendix hereto (Appendix, p. 2a).

The opinion of the Court of Appeals of Scioto County is unreported and appears in the Appendix hereto (Appendix, p. 18a).

The opinion of the Common Pleas Court of Scioto County is unreported and appears in the Appendix hereto (Appendix, p. 20a).

JUDISDICTIONAL GROUNDS

(a) The judgment and decree of the Supreme Court of Ohio herein sought to be reversed is dated and entered October 26, 1955, (Appendix, p. 1a) wherein the Supreme Court of Ohio affirmed the judgment and order of the Court of Appeals of Scioto County, which judgment and order enjoined the defendants as follows:

> "It is therefore the judgment and order of this court that an injunction issue enjoining the defendants-appellants, either collectively or individually, their agents and sympathizers, from picketing plaintiffs-appellees' place of business; and that they be enjoined from interfering in any way, directly or indirectly, with the operation of plaintiffs-appellees' business, any of plaintiffs-appellees' customers, or any other person entering upon plaintiffs-appellees' premises." (Tr. p. 17).

(b) An order granting an extension to March 22, 1956, to file the petition for certiorari herein was granted by the Hon. Stanley Reed on the 10th day of January, 1956.

(c) The statutory authority which confers jurisdiction on this Court is Title 28 U.S.C. Section 1257 (3) in that the rights and privileges of the petitioners are claimed under the Fourteenth Amendment (embracing the First Amendment) of the Constitution of the United States.

QUESTIONS PRESENTED

QUESTION NO 1. Is the public policy of a state, prohibiting picketing unless the employer's own employees are in controversy with him, violative of the First and Fourteenth Amendments of the United States Constitution?

QUESTION NO. 2. Does a state violate the Fourteenth Amendment by prohibiting picketing on the basis of a pronouncement by its court of "public policy" which is without basis?

QUESTION NO. 3. Have petitioners' Constitutional rights been violated by a decision based upon unsubstantial findings of fact?

QUESTION NO. 4. Have petitioners' Constitutional rights been violated by an injunction prohibiting all picketing, even though the court found picketing for only one purpose unlawful?

THE CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions which the case herein involves are: Amendment 1 of the Constitution of the United States as follows:

"Amendment I. [Religion, Free Speech, etc.]
Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment 14, paragraph #1, of the Constitution of the United States as follows:

"Amendment XIV. [Rights of Citizens.]
1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citi-

zens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

• • •

STATEMENT OF THE CASE

Petitioners are a trade union and its officers, known as Local 429 of the Hotel & Restaurant Employees and Bartenders International Union. *Respondents* are the owners and operators of a restaurant and tavern in the City of Portsmouth, Ohio known as "State Bar and Grill".

On January 24, 1953 petitioners commenced picketing respondents' place of business and respondents sought an injunction in the Common Pleas Court of Scioto County.

The respondents alleged as grounds for an injunction that petitioners did not represent any of respondents' employees; that no labor dispute existed between the respondents and their employees and that such picketing and exhibition of said sign in front of respondents' restaurant was an unlawful violation of respondents' Constitutional rights (Tr. p. 2) and prayed that: "a temporary injunction be granted enjoining defendants, either collectively or individually, their agents and sympathizers, from picketing plaintiffs' place of business; that said sign be removed and that they be enjoined from interfering in any way, directly or indirectly, with the operation of plaintiffs' business, any of their customers, or any other person entering upon plaintiffs' premises; that upon final hearing hereof said injunction be made permanent and for other and further relief as may be just and equitable."

On January 28, 1953 the Common Pleas Court granted a temporary restraining order as prayed for, which continued in effect until the matter was brought on for trial after answer. At that time the parties entered into a stipulation of facts, (Bill of Exceptions, Tr. p. 6) which summarized, is as follows:

Prior to January 28, 1953 the petitioner Royalty, acting as agent for Local 429, requested that the respondents, owners of a restaurant, commence negotiations with the union for a union contract at the respondents' place of business. The respondents refused to do this and suggested to Royalty that he take the matter up with their employees. Thereafter, again prior to January 28, 1953, Royalty again casually reminded respondent Harry Chucales of his request to commence negotiations, but there was no further discussion of the matter.

On January 28, 1953, the petitioner, Slaughter, acting as agent for Local 429, approached respondent, Harry Chucales, and asked him if he was going to run a union place and requested that he enter into a contract with Local 429. Harry Chucales refused and again advised Slaughter to talk to the restaurant employees to see whether they wanted to join the union. Slaughter thereupon left the respondents' restaurant and within an hour picketing commenced. Pickets carried signs stating:

> "This place does not employ members of Bartenders, Hotel and Restaurant Employees and Miscellaneous Workers Local No. 429, American Federation of Labor."

The picketing at all times was peaceful and was conducted by a member of Local 429. At no time revelant to the issue was any of respondents' employees members of the petitioner Local 429.

On the basis of the aforementioned stipulation the court ordered that the injunction theretofore granted be made permanent. (Tr. p. 12).

Appeal on law and fact was taken to the Court of Appeals of Scioto County, Ohio and it was agreed that the aforementioned stipulation of facts entered into between the parties below would constitute an Agreed Statement of Facts containing all evidence for purposes of appeal. (Tr. p. 13).

On June 30, 1954, the Court of Appeals found that the picketing was for the purpose of (1) having respondent employ only members of the union—(which could only be accomplished by) (2) having respondent discharge present employees and hiring employees who had membership in petitioners' union. (Opinion Appendix, p. 19a). The Court further found that picketing or bannering for the purpose of bringing pressure upon an employer to compel his employees to join a union was for an illegal purpose and should be enjoined.

Thereupon, on July 26, 1954 the court entered an order granting the broad injunction previously quoted on page two hereof (Tr. p. 17).

An Appeal as of Right and a Motion to Certify the Record were filed in the Supreme Court of Ohio. Respondents filed a motion to dismiss the Appeal as of Right. On January 15, 1955 petitioners' Motion for an Order to Certify was overruled by the court and respondents' Motion to Dismiss the Appeal as of Right was likewise overruled. The case therefore stood in the Ohio Supreme Court on appeal as of right.

On October 26, 1955, the Ohio Supreme Court in an opinion by Taft, J. found that the facts of the case contained in the Agreed Statement of Facts and those "properly inferrable therefrom" substantiated a finding that the picketing

was "for the purpose of compelling the respondents to discharge their employees unless they joined petitioners' union" (Appendix, p. 2a), and that such picketing violated the public policy of Ohio, to-wit:

> "...the common-law public policy of Ohio may still regard peaceful picketing as unlawful where there is no dispute between the employer and his employees and where the picketing is conducted against the employer by persons who were never employed by him and who do not represent anyone that ever was so employed and where it is conducted for the purpose of pressuring the employer to compel his employees to become members of a union." (Appendix, p. 10a-11a).

The opinion of the Supreme Court of Ohio finding an alleged "public policy": (1) was based solely upon vague and uncontrolling language of one prior Ohio decision which has by subsequent decision of the same court been limited to the precise facts of the case and which has not been accepted by Ohio courts because of its conflict with this court's holding in *A.F.L.* v. *Swing*, 312 U.S. 321, and (2) was in conflict with clear legislative expression of the General Assembly of Ohio.

THE CONSTITUTIONAL QUESTIONS

The constitutional questions herein sought to be reviewed were raised at every point in the proceedings. In the brief of petitioners filed in the Common Pleas Court, the petitioners asserted that the right to picket was guaranteed by the First and Fourteenth Amendments of the Constitution of the United States. The Motion for New Trial filed in the Common Pleas Court alleged as one of the grounds therefor that the: "decision, order, judgment, and decree interfere with the civil rights of these defendants, the deprivation of which constitutes a violation of the defend-

ants' rights under the Constitution of the United States of America, of freedom of speech, freedom peaceably to assemble, as well as their rights to due process, all protected and guaranteed by the First and Fourteenth Amendments to the Constitution of the United States." (Tr. p. 4).

The constitutional questions were again raised in the Court of Appeals of Scioto County by the brief of Petitioners on Appeal on Questions of Law and Fact and were specifically referred to and disregarded by the Court of Appeals in its opinion as follows:

> "It would serve no useful purpose for this court further to discuss the law of the case with comments on the United States Supreme Court divisions [decisions] and State of Ohio Supreme Court decisions noting either distinctions of or exceptions from the principles of law contained therein." (Appendix, p. 20a).

The constitutional questions were raised in the appeal to the Supreme Court of Ohio in the Assignments of Error. (Appendix, p. 15a).

The Supreme Court of Ohio in its opinion specifically passed upon these questions as follows:

> "In our opinion, where the public policy of a state regards picketing of the kind involved in the instant case as unlawful, a state court may enjoin such picketing without infringing the right of free speech guaranteed by the Fourteenth Amendment to the federal Constitution; and the fact, that such public policy has been found by the courts of that state to be a part of its common law instead of being expressed by its Legislature in statutory form, is immaterial." (Appendix, p. 5a).

REASONS FOR ALLOWANCE OF THE WRIT

1. The Supreme Court of Ohio has decided a federal question of substance directly contrary to that of the applicable decisions of this court. Ohio has declared that a state does not infringe upon rights protected by the Fourteenth Amendment embracing the First Amendment, by prohibiting picketing because of the absence of an employer-employee relationship. This is contrary to this court's holding in *A.F.L.* v. *Swing*, 312 U.S. 321. The general principle of the *Swing* case has been a guide to labor organizations of Ohio and to its thousands of members. Ohio Courts of Common Pleas and Appeals have applied the *Swing* doctrine in hundreds of cases to permit stranger picketing. It is therefore of far-reaching importance that labor and management both be advised that their rights continue to be protected by a clear affirmance of the doctrine of *A.F.L.* v. *Swing*, supra.

2. Ohio, by its action herein, has raised a constitutional question of the first magnitude, to-wit: How far may a state court go in formulating a public policy abrogating constitutional rights without any legislative foundation or a history of widely accepted practices? The petitioners believe that the declaration of public policy by the judicial organ of a state must be based on substantial law and fact to warrant the constriction of a constitutionally protected right. Petitioners believe that the decisions in *Building Service Employees Local 262* v. *Gazzam*, 339 U.S. 532, *Hughes et al* v. *The Superior Court of California*, 339 U.S. 460, and *Teamsters Union* v. *Hanke*, 339 U.S. 470, were not intended by this court to give a state court a "carte blanche" in picketing cases. Yet this is the effect of the Ohio holding in the instant cause. Although the aforementioned decisions have been seized upon by state after state court to announce a new public policy, no state court has ever undertaken to

announce such a public policy without reference to some clear statutory or constitutional authority. Ohio, by misapplying *Gazzam, Hanke,* and *Hughes,* has fabricated a policy which is not referable to statutory or constitutional expression or clear, widely accepted common law, and which is contrary to legislative expression.

It is respectfully suggested that this court must determine whether a state Supreme Court, by the mere use of the magic words "public policy", without substantial basis, may curtail important constitutional rights.

ARGUMENT

QUESTION NO. 1. Is the public policy of a state, prohibiting picketing unless the employer's own employees are in controversy with him, violative of the First and Fourteenth Amendments of the United States Constitution?

This question, more briefly stated is: Is the doctrine of *A.F.L.* v. *Swing,* 312 U.S. 321, still in existence?

If we assume that the public policy of Ohio is in fact such that the Ohio Supreme Court's pronouncements thereof can be sustained, does such a policy banning picketing come within the ambit of state control or has it transcended the protection afforded under the Fourteenth Amendment?

The public policy upon which the Supreme Court of Ohio prohibited the instant picketing is stated in the opinion of the court (Appendix, p. 10a-11a):

> ". . . the common law public policy of Ohio, may still regard picketing against an employer as unlawful where there is no dispute between the employer and his employees and where the picketing is conducted by persons who were never employed by that employer and who do not represent anyone who ever was, and where it is conducted for the purpose of pressuring the employer to compel his employees to become members of the union."

This public policy therefore contains two inseparable elements, both of which must be present to make picketing unlawful:

1. There must be no dispute between an employer and his own employees, and picketing must be conducted by persons who were never employed by that employer and who do not represent anyone who ever was, *and*

2. The picketing must be conducted for the purpose of pressuring the employer to compel his employees to join the union of those conducting the picketing.

It follows *a fortiorari* that if there had been a dispute between the employer and his employees and the picketers had represented employees or former employees, the instant cause would not come within the limits of the public policy as announced. This policy does not, therefore, make it unlawful to coerce employers to coerce employees alone. It is only unlawful when done in the absence of an employer-employee relationship.

Although the measure of permissible state control over picketing may no longer be governed by the rule of "clear and present danger", a state may not proscribe picketing by "setting artificial bounds unreal in the light of modern circumstances" or by action which is "inconsistent with the rooted traditions of a free people." *Teamsters Union* v. *Hanke*, 339 U.S. 470; *Building Service Employees Local 262* v. *Gazzam*, 339 U.S. 532. This court has formulated no yardstick to measure state action in the light of the foregoing, but it has consistently adhered to the doctrine that a state may not proscribe picketing because of the absence of a direct employer-employee relationship. *A.F.L.* v. *Swing*, 312 U.S. 321.

In *A.F.L.* v. *Swing*, supra, this court was asked to "sustain a doctrine which for the purposes of this case asserts as the common law of a state that there can be no peaceful picketing or peaceful persuasion in relation to a dispute between

an employer and a trade union unless the employer's own employees are in controversy with him". This court concluded in that case that "such a ban of free communication is inconsistent with the guarantee of freedom of speech". See also *Cafeteria Employees* v. *Angelos*, 320 U.S. 293.

The basis for the court's decision in the *Swing* case exists to an even greater degree today. The "interdependence of economic interests of all engaged in the same industry" is more commonplace today than it was in 1940 and to draw the circle of economic competition so close as to contain only an employer and those directly employed by him is just as unreal in the light of modern circumstances today as it was in 1940.

Notwithstanding that this court has held that the Fourteenth Amendment is not violated by a state in prohibiting picketing:

—enmeshed with violence, *Milk Wagon Drivers' Union* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287;

—not related to the locus of dispute, *Carpenters and Joiners* v. *Ritter's Cafe*, 315 U.S. 722;

—the purpose of which is to force an employer to violate an antri-trust law, *Gibboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490;

—the purpose of which is to violate the clearly defined public policy of a state in regard to racial discrimination, *Hughes* v. *Superior Court of California*, 339 U.S. 460;

—the purpose of which is to violate the statutory public policy pertaining to self-employers, *International Brotherhood of Teamsters* v. *Hanke*, 339 U.S. 470;

—the purpose of which is to violate the statutory public policy of employers to coerce employees, *Building Service Employees Local 262* v. *Gazzam*, 339 U.S. 532;

—the purpose of which is to violate a right-to-work law, *Plumbers and Steamfitters Union et al* v. *Graham*, 345 U.S. 192.

—this court continues to recognize that state prohibition of picketing because of the absence of a direct employer-employee relationship transgresses the Fourteenth Amendment.

In *Building Service Employees* v. *Gazzam*, supra, this court stated:

> "In . . . [the Swing] case this court struck down the state's restraint of picketing based solely on the absence of an employer-employee relationship . . . the state has not here as in Swing relied on the absence of an employer-employee relationship. Thus the state has not, as was the case there, excluded workingmen from peacefully exercising the right of free communication by drawing the circle of free communication between employers and workers so small as to contain only an employer and those directly employed by him."

and in *International Brotherhood of Teamsters* v. *Hanke*, supra, the court stated:

> "What was actually decided in *A.F.L.* v. *Swing*, 312 U.S. 321, *Bakery and Pastry Drivers and Helpers Local* v. *Wohl*, 315 U.S. 769, and *Cafeteria Employees Union* v. *Angelos*, 320 U.S. 293, does not preclude us from upholding Washington's power to make the choice of policy she has here made. In those cases we held only that a state could not proscribe picketing merely by setting artificial bans, unreal in the light of modern circumstances, to what constitutes an industrial relationship or a labor dispute."

It is therefore apparent that although this court no longer considers picketing the absolute equation of free speech, the permissible boundaries of state control do not permit

a state to prohibit picketing because of the absence of a direct employer-employee relationship.

Ohio has conditioned the exercise of free speech through picketing on the existence of an employer-employee relationship. Its pronouncement of public policy must therefore fall on authority of *A.F.L.* v. *Swing*, supra.

QUESTION NO. 2. Does a state violate the Fourteenth Amendment by prohibiting picketing on the basis of a pronouncement by its court of "public policy" which is without basis?

The "public policy" announced by the Supreme Court of Ohio is based on no statutory or constitutional provisions or language, and is contrary to the expressions of the General Assembly of the State. The so-called policy was evolved from obscure language of one court decision which has not been widely accepted, and in fact has been limited by the courts of Ohio, under the authority of the *Swing* case.

General Considerations

The question presented in this section necessarily implies that the First and Fourteenth Amendments of the Constitution, interpreted in the light of the decisions of this court in *Building Service Employes* v. *Gazzam*, supra, *International Brotherhood of Teamsters* v. *Hanke*, supra, and *Hughes* v. *Superior Court*, supra, do not permit a state court to fabricate without basis a "public policy" which infringes upon an otherwise permissible expression of free speech. Even though the judicial organ of a state may express public policy, a court should not undertake such expression unless its basis may be found in established governmental practice, statutory enactments, or it is required to prevent violation of obvious ethical or moral standards. Compare

Muschany v. *The U.S.*, 324 U.S. 49, 66, 67. Primarily it is for the lawmakers to determine public policy, and its pronouncement is to be ascertained by reference to the laws and legal precedents and not to the general considerations of supposed public interest, *Twin City Pipe Co.* v. *Harding Glass*, 283 U.S. 353, 357.

This court has long recognized that the theory of public policy imposes a doctrine of vague and variable quality and unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as a basis of judicial determination only with the utmost circumspection. *Patton* v. *U.S.*, 281 U.S. 276, 306. The vague and elusive nature of public policy imposes the requirement that there be found some *definite* indications of the law of the sovereignty to justify a deprivation of a constitutional right. *Muschany* v. *The U.S.*, supra. This court therefore has the duty to ascertain if a pronouncement of public policy, which in substance works as a deprivation of an otherwise constitutional right, is in fact so widely accepted that its effect as law justifies the deprivation.

It is incumbent upon the court when a constitutional right such as the instant one has been asserted, to inquire not merely as to whether those rights have been denied in express terms, but also whether they have been denied in substance and effect. The court must review independently both the legal issues and those factual matters with which they are co-mingled. *Oyama* v. *California*, 332 U.S. 633. It is as appropriate for this Court to search the record to determine whether the crucial findings of *law* by a state court have a reasonable basis as it is to search the record to determine whether the findings of fact have such a basis. Compare *Plumbers Union* v. *Graham*, 345 U.S. 192.

It is just as important that freedom of speech be not circumscribed by insubstantial conclusions of *law* screening reality, as it is that such freedom be not nullified by insubstantial findings of *fact*. Compare *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287.

Ohio Public Policy

(a) Legislative or constitutional authority.

A reading of the opinion in the instant cause reveals that there is no legislative enactment, statutory language or constitutional provision upon which the court relied in "formulating" Ohio's "widely accepted" public policy. In the absence of this, we must with utmost circumspection look to a clear expression by court decisions.

(b) Court decisions.

The decisions of Ohio courts clearly do not justify the pronouncement of public policy by the Court. The Supreme Court evolved a public policy from uncontrolling language of a decision which was not applied by Ohio courts, and which has been limited in application by *A.F.L.* v. *Swing*, supra. The Ohio case, *Crosby* v. *Rath*, 136 O.S. 352 (25 NE 2d 934) was decided by the Ohio Supreme Court on March 6, 1940; certiorari denied by this Court, 312 U.S. 690, on the same day that this Court decided *A.F.L.* v. *Swing*, 312 U.S. 321, and *The Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287.

Prior to the *Crosby* v. *Rath* case the Supreme Court of Ohio had permitted peaceful picketing for the purpose of obtaining a closed shop (thus "coercing" employees). *La France Electrical Construction & Supply Company* v. *The International Brotherhood of Electrical Workers*, 108 O.S. 61, 138 NE 899. In that case the court stated at p. 93:

> "It is difficult upon principle to see how persuading a man to do a thing which he may do with perfect legality can be illegal."

Crosby v. *Rath*, supra, is distinguished from the *LaFrance* case by the violence which justified the injunction, *Milk Wagon Drivers* v. *Meadowmoor Dairies, Inc.*, supra. During the course of the opinion in the *Crosby* case, however, the court remarked without citation of any authority:

> "It is not even contended that in the instant case there is any dispute whatsoever between the plaintiff and her employees, as in the La France case, supra. On the contrary, the only dispute in the instant case is between the plaintiff and the defendants with whom the plaintiff's employees have no connection. The thing upon which the defendants are insisting is that the plaintiff discharge her employees unless they become members of one of the defendant unions. There is no reason or convincing authority sustaining the contention of the defendants that they have the right to engage in picketing or boycotting under such circumstances. . . "

It is this language upon which the court in the instant case announced that the solemn, widely accepted public policy of Ohio is as follows:

> "The public policy of Ohio, as determined by its courts regards picketing against an employer as unlawful where there is no dispute between the employer and his employees and where the picketing is conducted by persons who were never employed by that employer and who do not represent anyone who ever was, and where it is conducted for the purpose of pressuring the employer to compel his employees to join the union of those conducting the picketing."

At the outset it should be noted that the court below "changed" the public policy from "discharge of employees"

in the *Crosby* case to "pressuring the employer to compel his employees to join the union."

A review of the Ohio cases demonstrates that the pronouncement that *Crosby* v. *Rath* proclaims a public policy is a recent formulation, for *Crosby* v. *Rath* has been limited by the courts of Ohio to the precise facts of the case, and has not only been not widely accepted but is probably one of the most misinterpreted cases in Ohio law.

From its pronouncement, the confusion in the *Crosby* opinion concerned the question whether or not picketing was permissible in the absence of an employer-employee relationship. The variety of opinions on this issue was brought about by the denial of certiorari in the *Crosby* case on the same day that *A.F.L.* v. *Swing*, supra, was decided. It is safe to say that most lower courts of Ohio rejected *Crosby* v. *Rath* on the basis of *A.F.L.* v. *Swing*, as is revealed by the following cases:

Friedman v. *Cincinnati Joint Board*, 86 O.A. 189, (November 26, 1941, Court of Appeals of the First Appellate District):

> "While it was held in Crosby v. Rath, 136 O.S. 352, by a divided court that there was no right to peaceful picketing in the absence of a trade dispute, in a restricted sense of a dispute between the plaintiff and his own employees that decision was nullified as an authority on that point by the decision of the Supreme Court of the U. S. in the case of American Federation of Labor v. Swing, et al, 312 U.S. 87."

Lubbers v. *Hurst*, 36 O.O., 495 (December 23, 1946, Common Pleas Court of Butler County):

> "The Crosby case, supra, is the latest expression of the Supreme Court of Ohio on this subject. It was decided prior to the decision in the case of American Federation of Labor v. Swing, decided by the Supreme Court of the United States on February 10, 1941, found in 61

Sup. Ct., page 568. Therein, Justice Frankfurter in speaking for the court said: '• • • A state cannot exclude working men from peacefully exercising their right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. Interdependence of economic interests of all engaged in the same industry has become a commonplace.'" • • •

"The purpose of the defendants in maintaining these pickets is of course to induce the plaintiff to employ only union help to establish a closed shop. Such a purpose, the Supreme Court of the United States has held to be lawful • • • "

Sterling and Welch Company v. *Marie Duke*, 33 O.O. 482 (Common Pleas Court of Cuyahoga County, April 22, 1946):

"The most notable case of recent years is the case of American Federation of Labor v. Swing, et al. (1941), 312 U.S. 321, which recognizes 'stranger' picketing as lawful and as being a form of exercise of the freedom of speech guaranteed under the 14th Amendment. In this case it was held that the state of Illinois was not free to enforce its common law labor policy in such a manner as to prohibit such picketing provided however that the picketing was conducted without violence."

Jones v. *IAM*, 75 N.E. (2d) 446, 49 O.L.A. 97 (1947) the court said:

"In view of the decisions in the Swing, Wohl and Angelos cases, cited above, it is the opinion of this court that the rule announced by the Crosby case, to wit, that a labor dispute did not exist in the absence of disagreement between an employer and its employees is no longer valid and that the Crosby case has been superseded by these latter decided United States Supreme Court cases in this respect."

Iacomini's Restaurant v. *Hotel and Restaurant Employees and Bartenders Local 18*, 63 O.L.A. 258, 107 N.E. (2d) 43 (Court of Appeals of Summit County) (1949):

> "The constitutional guarantee of freedom of discussion is infringed by a judicial policy of a state to forbid resort to peaceful persuasion through picketing where there is no immediate employer-employee relation, as in the case of attempted unionization of a business employing non-members of a union."

See also *Dummermuth* v. *Hykes*, 59 O.L.A. 481 (Common Pleas Court of Tuscarawas County, July, 1950). *Nicholson* v. *Vending Machine Service Employees Local 410-A*, 63 O.L.A. 19 (Feb. 28, 1952).

In the *Nicholson* case the court reviews the decision of *Howard* v. *International Brotherhood* (unreported), decided by the 7th District Court of Appeals of Ohio, in which the court stated:

> "Plaintiff's evidence discloses that there was no threat made and no violence of any kind committed, no attempt to intimidate suppliers of merchandise made, thus distinguishing the case of Crosby v. Rath * * *
> "Our decision is based entirely upon the 14th Amendment to the Constitution of the United States, guaranteeing freedom of speech to all good citizens, limited of course to the right to speak the truth."

In *Donofrio* v. *Bartenders Local, et al.*, No. 132350, Common Pleas Court, Mahoning County; Court of Appeals, Mahoning County; certiorari refused, Supreme Court of Ohio, No. 32976, (unreported) the court concluded, after discussing the 1950 decisions of this court:

> "Is there any policy enunciated in Ohio, either by legislative enactment or by judicial opinion, defining the rights and privileges as between an employer on the one hand and the union on the other, and the em-

ployees in the third position? There is no legislative enactment, at least there has been none called to my attention and none that I could find.

"The question becomes: Is there any policy of the State established by judicial decision other than the Crosby case? – and I have been able to find none – and the principle laid down in the Crosby case has been nullified, as pointed out above by the decisions in the Senn and Swing cases; * * *"

The foregoing summary of cases demonstrates that *Crosby* v. *Rath* not only did not stand for any widely accepted public policy, but its holding was confused and limited by this Court's decision in *A.F.L.* v. *Swing* and subsequent cases.

This confusion in *Crosby* v .*Rath* was apparently settled by the Supreme Court of Ohio in the case of *Grimes and Hauer* v. *Pollock*, 163 O.S. 372, decided on May 25, 1955, approximately 5 months before the decision in the instant case. The appellees in *Grimes and Hauer* asserted, as in the lower court, that *Crosby* v. *Rath* established the public policy of Ohio. The court specifically rejected this contention and limited *Crosby* v. *Rath* to the exact facts of that case when in speaking of the *Crosby* case and *W. E. Anderson Sons* v. *Local Union 311*, 156 O.S. 541, 104 N.E. (2d) 22, it said:

> "Those cases hold that picketing was unlawful under the precise facts which are in issue but to go further and say on the authority of such cases that the firm policy of Ohio is to prohibit agreements of the kind described in Section 164 (b) [union shop agreements of the Taft-Hartley Act] is hardly tenable."

Concurrently with the aforementioned decisions limiting *Crosby* v. *Rath*, the Ohio courts have permitted peaceful picketing for the purpose of obtaining a "union shop" or closed shop contract (both of which "coerce employees")

See: *LaFrance Electrical Construction & Supply Co.* v. *International Brotherhood of Electrical Workers*, 108 O. S. 61, 138 NE 899 (previously referred to); *Clark County Lunch Company* v. *Waiters Local*, 22 O.A. 265, Court of Appeals, Cuyahoga County, citing and approving *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U.S. 184; *Lubbers* v. *Hurst*, 36 O.O. 495; *Dummermuth* v. *Hykes*, 59 O.L.A. 41 (1950).

(c) Legislative History

Primarily it is for the lawmakers to determine the public policy of the state. *Twin City Pipe Co.* v. *Harding Glass*, 283 U. S. 353, 357. Not only is the decision of *Crosby* v. *Rath* not widely accepted and never intended as a pronouncement of public policy, but the General Assembly of the State of Ohio has clearly expressed itself contrary to the view expressed by the Supreme Court of Ohio.

The General Assembly of Ohio has on four different occasions refused to enact legislation which would unmistakably declare the public policy of Ohio to be as announced by the court:

On February 14, 1949, House Bill 569 prohibiting union shop and closed shop contracts and any activity to achieve that end was introduced and referred to the House Committee on Industry and Labor. This bill has never been reported favorably out of committee.

On March 1, 1951, Senate Bill 213 was introduced and referred to the Senate Financial Institution, Commerce and Labor Committee. Again, this bill was not reported favorably out of committee.

Finally on March 26, 1953, House Bill 647 was introduced and referred to the House Committee on Industry and Labor. On May 14, 1953, the Committee considered such a right-to-work bill, and allowed it to die.

Again in 1955 a bill designated "Substituted Senate Bill 101", a copy of which is appended hereto (Appendix p. 22a) was introduced, specifically stated:

> "It is hereby declared to be the public policy of Ohio * * * that the exercise by any person of the right to work shall not be interfered with because of their membership or non-membership in any labor organization."

Section 2923.44 (App. p. 24a) of the proposed Act made it unlawful to engage in the type of activity herein, declared by the Supreme Court to be against its public policy. Although widespread public hearings were had and full discussion of the proposed Bill was afforded to every interested party, the legislature of this state did not see fit to pass this legislation.

Long, unsuccessful efforts to declare the public policy of Ohio through the appropriate means of legislative enactments were accomplished by the court in a matter of minutes by merely vesting themselves in legislative attire and pronouncing a public policy which is contrary to the express will of the legislature.

Comparison and Conclusion

It is submitted that this court has recognized that state public policy and state law based solely upon judicial decisions should be accepted with utmost circumspection. In order that it be clear that the determination of state law must have some basis, the court has heretofore accepted state interpretations where:

> The law has been conclusively settled by a long line of decisions which have become a rule of property. *Castillo* v. *McConnico*, 168 U.S. 674 (cited as authority in *Hughes* v. *Superior Court*).

> Where there is settled state practice, deeply embedded traditionally, or other decisions long sanctioned and indeed conventional; *Nashville, Cincinnati and St. Louis Railroad* v. *Browning*, 310 U. S. 369.
>
> Where the court proceeded on sound principle and abundant authority; *Long Sault Development Co.* v. *Call*, 242 U.S. 272, 280.

In the landmark picketing decisions of 1950, the court was also careful to qualify state public policy as being a "widely accepted one". Certainly the public policy of the State of Washington accepted by this court in *Building Service Employees* v. *Gazzam*, supra, and *International Brotherhood of Teamsters* v. *Hanke*, supra, was widely accepted because it was directly referable to statutory language. Although the court conceded the Washington Supreme Court's power to announce a public policy in the *Hanke* case, it was clear by the decision of that court that its findings were sustained on the same authority found in *Gazzam*.

> "The facts in the instant case fall squarely within the inhibition of the holding of the Gazzam case." *Hanke* v. *International Brotherhood of Teamsters*, (1949) 133 Wash. Dec. 625, 207 Pac. (2d) 206.

In *Hughes* v. *Superior Court*, supra, the court found that the purpose of the picketing was to force employment on "arbitrary discrimination upon the basis of race and color alone rather than a choice based solely on the individual qualifications for the work to be done • • • which we condemned in the *Marinship* case, supra." *James* v. *Marinship*, 25 Cal. 2d, 721. In the *Marinship* case it was clear that the public policy of California was not only widely accepted, but was directly inferable from the United States constitution, legislative enactments of California, and executive orders of the President of the United States.

A comparison of the above cases with the decision of the Ohio court in the instant cause reveals that the alleged public policy of Ohio was not conclusively settled by a long line of decisions, was not settled state practice, was not deeply embedded, was not long sanctioned, indeed not conventional, and certainly not widely accepted. To the contrary, the inconsistency of judicial opinion and conflict of authority in Ohio suggests that the Ohio court adopted the aforequoted "public policy" to evade a claim of constitutional rights. Compare *Fox River Co.* v. *Railroad Commission*, 274 U. S. 651, *Nichols* v. *Cole*, 256 U. S. 222, *Ward* v. *Commissioner of Love County*, 253 U. S. 17, 22.

It is not alone for the Ohio Supreme Court to determine whether persons engaged in an industrial struggle cannot continue without danger to the community nor is it a function of the Ohio Supreme Court to set the limits of permissible contest as it has done here. It is the function of the legislature, if at all, to substitute the process of justice and due process, for the independent speculation of the court as to what is for the public good in limiting individual or group rights. Compare dissenting opinion of Justice Brandeis in *Duplex Printing Company* v. *Deering*, 254 U. S. 443, 41 Supreme Court 172, cited and approved by this court in *Giboney* v. *The Empire Storage Company*, 336 U.S. 490.

QUESTION NO. 3. Have petitioners' Constitutional rights been violated by a decision based upon unsubstantial findings of fact?

The findings of fact of the Supreme Court of Ohio have no reasonable basis in the evidence, and the insubstantial findings of fact screening reality impair the constitutional rights of the petitioners.

The agreed statement of facts containing all the evidence considered by the court is as follows (Tr. p. 13):

AGREED STATEMENT OF FACTS.

Now come plaintiffs-appellees by their counsel and defendants-appellants by their counsel and submit to this court the following agreed statement of facts in this appeal on questions of fact and law:

It is stipulated and agreed by and between counsel for plaintiffs-appellees and counsel for defendants-appellants that plaintiffs-appellees are a partnership composed of Harry Chucales, Gus Chucales, and Lula Chucales, doing business as the Star Bar and Grill at 603 Chillicothe street, in the city of Portsmouth, Ohio, a restaurant business catering to the general public in the operation of their business.

It is stipulated by and between counsel for plaintiffs-appellees and defendants-appellants that defendant-appellant, Local No. 429, is a labor organization and an unincorporated association affiliated with the Hotel and Restaurant Employees and Bartenders International Union, which is in turn affiliated with the American Federation of Labor. Defendant-appellant, Local 429, is composed of persons employed in the hotel, restaurant, and bar industries in the county of Scioto, state of Ohio.

It is stipulated by and between counsel for plaintiffs-appellees and counsel for defendants-appellants, that defendant-appellant, William O. Royalty, is the acting secretary of defendant-appellant, Local No. 429.

It is further stipulated that on one occasion, prior to January 28, 1953, defendant-appellant, William O. Royalty, acting as agent of Local No. 429, approached plaintiff-appellee, Harry Chucales, and requested that plaintiffs-appellees commence negotiations with defendant-appellant, Local No. 429, for a union contract; that plaintiffs-appellees refused; that plaintiff-appellee, Harry Chucales, told defendant-appellant, William O. Royalty, to take the matter up with his employees.

It is further stipulated that on another occasion prior to January 28, 1953, defendant-appellant, William O. Royalty, casually reminded plaintiff-appellee, Harry Chucales, of this request but there was no extended discussion of the matter.

It is further stipulated that at all times mentioned in the petition and answer, no employees of plaintiffs-appellees were members of defendant-appellant, Local No. 429.

It is further stipulated that on the twenty-eighth day of January, 1953, George Slaughter, defendant-appellant herein, acting as agent of defendant-appellant, Local No. 429, approached plaintiff-appellee, Harry Chucales, and asked him if he was going to run a union place and requested that he enter into a contract with the defendant-appellant, Local No. 429, and that plaintiff-appellee, Harry Chucales, told the defendant-appellant, George Slaughter, to talk with his employees as to whether or not they desired to join the union and that the said George Slaughter did not contact the employees of plaintiffs-appellees' establishment requesting them to join the union, Local No. 429, but left the plaintiffs-appellees' establishment, and within an hour thereafter, the picketing described hereafter commenced.

It is further stipulated that on the twenty-eighth day of January, 1953, defendant-appellant, Local No. 429, commenced picketing on the sidewalk in front of the said State Bar and Grill. Said picketing consisted of one picket at a time. Said picketing was peaceful. The picket carried a sign stating "This place does not employ members of Bartenders, Hotel and Restaurant Employees and Miscellaneous Workers Local No. 429, American Federation of Labor."

It is further stipulated and agreed that the defendants-appellants, or any agent of Local No. 429 of the Hotel &

Restaurant and Bartenders Union, at no time approached the employees of plaintiffs-appellees, requesting them to join the defendant-appellant union, Local No. 429.

It is further stipulated that on the twenty-eighth day of January, 1953, shortly after the picketing started, the plaintiff-appellee, Gus Chucales, approached each of the employees of the State Bar and Grill and asked each employee if he or she was a member of the defendant-appellant, Local No. 429, or if they desired to join Local No. 429. Each employee replied in the negative to both questions.

It is further stipulated that the picket who carried the above described banner in front of plaintiffs-appellees' establishment, at no time mentioned herein was an employee of plaintiffs-appellees; said picket, however, was a member at all times herein mentioned of Local No. 429.

It is further stipulated that this agreed statement of facts are the facts upon which this court should consider this appeal."

* * *

The court below concluded from the aforementioned facts that the purpose of the picketing in the instant cause was to

> "pressure plaintiffs to discharge their employees unless they joined [petitioner's] * * * union." (Opinion Appendix p. 3a).

This unwarranted conclusion was reached by the most tortuous reasoning on the basis of inference upon inference not sustained by the evidence.

From the foregoing Agreed Statement of Facts the Ohio court concluded that the wording on the sign "tends to show that the only thing defendants were interested in was getting plaintiffs' employees into the union." However, the court conjectures that since the plaintiffs had not objected to defendants talking to plaintiffs' employees about

joining the union, there was no apparent reason for defendants to picket before talking directly to the employees. (App. p. 3a). The court therefore "reasons" that the purpose of the picketing was to:

> "conscript plaintiffs or to pressure plaintiffs into volunteering as allies of defendants and pressuring plaintiffs' employees to join defendants' union."

The court again conjectures:

> "In order to compel their employees to join defendant union it would be necessary for plaintiffs to discharge employees unless they joined that union."

From which the court then concludes:

> "In effect therefore defendants' purpose of pressuring plaintiffs to compel their employees to join defendant union amounted to the purpose of pressuring plaintiffs to discharge employees unless they joined that union."

The Ohio court has therefore reduced the Agreed Statement of Facts to the following simple mathematical equation:

A request to sign an unspecified union contract +

A request to run a union house +

A picket sign stating, "This place does not employ members of Bartenders, Hotel and Restaurant Employees and Miscellaneous Workers Local 429, American Federation of Labor"

= Picketing for the purpose of forcing the employer to discharge his employees.

If the court were to engage in conjecture and inferences, it would have been even more logical, though just as improper, to presume that the purpose of picketing was to advertise to other union members and to the general public the information contained on the banner, to-wit, that this particular employer did not employ union members, in order that union members and others of the general public sympathetic to labor might avoid patronizing a non-union establishment and patronize a union establishment. This purpose to protect union members working in union establishments in their struggle to maintain favorable working hours and conditions would certainly not be unlawful.

The record reveals that no issue as to the *purpose* of picketing in any way arises from the respondents' pleading (Petition Tr, p. 1) or the Agreed Statement of Facts. There is no claim of purpose, no evidence of purpose; no evidence that the union ever demanded that the plaintiff enter into a contract which would require plaintiff's employees to join the union; no evidence that the union would have required in any way that plaintiff discharge any employees who refused to become members of the union; and no evidence that the picketing carried on was done to attain these objectives.

The sole question which arises from the Agreed Statement of Facts and pleadings is: "May a state court limit the exercise of the right to picket to situations where an employer is in dispute with his own employees?" The answer to this question has been fully discussed in question No. 1, herein and requires a negative answer. *A.F.L. v. Swing*, 312 U.S. 321.

The issue of "purpose" and conclusions in support thereof, give the impression that they became a part of the court's opinion by a tortuous process to achieve what the court considered to be the desired result, without reference to

the law or facts. This is the very evil which the United States Supreme Court has explicitly stated it will guard against.

In a case of this kind therefore this court is justified in searching the record to determine whether the crucial findings by the state courts had reasonable basis in the evidence, for it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by the insubstantial findings of fact screening reality. That is why this court has the ultimate power to search the records in the state courts where a claim of unconstitutionality is effectively made. *Milk Wagon Drivers* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, *Plumbers and Steamfitters* v. *Graham*, 345 U. S. 192.

It is therefore submitted that the crucial findings of fact by the court below have no reasonable basis in the evidence and that therefore petitioners' constitutional rights have been defeated by insubstantial findings of fact screening reality.

QUESTION NO. 4. Have petitioners' Constitutional rights been violated by an injunction prohibiting all picketing even though the court found picketing for only one purpose unlawful?

The injunction affirmed by the Supreme Court of Ohio reads as follows:

> "It is therefore the judgment and order of this court that an injunction issue enjoining the defendants-appellants, either collectively or individually, their agents and sympathizers, from picketing plaintiffs-appellees' place of business; and that they be enjoined from interfering in any way, directly or indirectly, with the operation of plaintiffs-appellees' business, any of plaintiffs-appellees' customers, or any other person entering upon plaintiffs-appellees' premises."

The opinion of the Supreme Court of Ohio found picketing by specific persons for a specific purpose unlawful, to-wit: by persons who are not employees or representatives of employees for the purpose of pressuring the employer to compel his employees to become members of the Union.

It is apparent that the order and decree herein sought to be reviewed is not tailored for the specific violation of state public policy. It is a broadside against all picketing (which this court condemned in *Thornhill* v. *Alabama*, 310 U. S. 88, *Cafeteria Employees* v. *Angelos*, supra) whether it be by employees or not, or for the specific purpose found by the court to be unlawful, or for any other lawful purpose.

This court has continued to condemn such broadside injunctions and was careful to point out in *Building Service Employees Local 262* v. *Gazzam*, supra:

> "The injunction granted was tailored to prevent a specific violation of an important state law. The decree was limited to the wrong being perpetrated, namely 'an abusive exercise of the right to picket' • • •"

In the instant cause the decree is not tailored to meet the specific violations of alleged state law and therefore violates the constitutional rights of petitioners.

WHEREFORE your Petitioners respectfully pray that this petition for writ of certiorari to review the judgment and order of the Supreme Court of Ohio be granted, to the end that said judgment and order may be reversed by this Honorable Court.

Respectfully submitted,

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Jonas B. Katz,
Jerome A. Lischkoff,
Of counsel.

APPENDIX

Supreme Court of Ohio

HARRY CHUCALES, GUS CHUCALES, and LULA CHUCALES, dba "State Bar and Grill,"

Plaintiffs-Appellees,

vs.

WILLIAM O. ROYALTY, GEORGE SLAUGHTER, and LOCAL NO. 429 of the HOTEL and RESTAURANT EMPLOYEES and BARTENDERS INTERNATIONAL UNION,

Defendants-Appellants.

ENTRY AFFIRMING COURT OF APPEALS

(CAPTION)

Journal No. 41, page 605. Wednesday, October 26, 1955.

APPEAL FROM THE COURT OF APPEALS OF SCIOTO COUNTY.

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Scioto County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the same is hereby, affirmed; and it appearing to the Court that there were reasonable grounds for this appeal it is ordered that no penalty be assessed herein.

It is further ordered that the appellees recover from the appellants their costs herein expended taxed at $.....

ORDERED, That a special mandate be sent to the Court of Common Pleas of Scioto County, to carry this Judgment into Execution.

ORDERED, That a copy of this entry be certified to the Clerk of the Court of Appeals of Scioto County, "for entry".

OPINION OF SUPREME COURT OF OHIO

(CAPTION)

OPINION: TAFT, JUDGE

Defendants complain that the judgment of the Court of Appeals was based upon its finding that the picketing was for the purpose of bringing pressure upon plaintiffs to compel their employees to join the defendant union but that the petition contains no allegation with respect to any such purpose. We believe that the power of this court, with respect to amendments to pleadings (Section 2309.58, Revised Code), and the directions of the General Assembly, with respect to disregarding defects in pleadings not affecting substantial rights of the adverse party (Section 2309.59, Revised Code), are such that we are not justified in setting aside the judgment of the Court of Appeals in the instant case merely because the petition fails to specify the unlawful purpose of the picketing. The petition does allege that the picketing was unlawful, no motion to make it definite and certain was filed, no demurrer thereto was filed, and defendants were apparently not misled by such failure to specify the unlawful purpose of the picketing.

Defendants also complain because the agreed statement of facts does not include, as one of the agreed "facts upon which" the Court of Appeals "should consider" the appeal, that the picketing was for any such purpose. However, where parties agree that certain facts are "the facts upon which" the "court should consider" a case, the court, in deciding such case, may quite properly base its decision in part upon other facts, that may reasonably be inferred from the facts agreed upon.

In view of the facts agreed upon in the instant case, the Court of Appeals could hardly have found that there was any purpose for the picketing except the purpose of pressur-

ing plaintiffs to compel their employees to join the defendant union. Although the wording of the signs used in the picketing tends to show that the only thing defendants were interested in was getting plaintiffs' employees into the union, plaintiffs had not objected to defendants' talking to plaintiffs' employees about joining the union and had even suggested that defendants do so. Especially before defendants had taken advantage of this opportunity to talk with plaintiffs' employees, there would appear to be no apparent reason for defendants to picket in order merely to pressure or to persuade those employees to join the defendant union. It is quite clear from the facts agreed upon that the purpose of the picketing was to conscript plaintiffs, or to pressure plaintiffs into volunteering, as allies of defendants in pressuring plaintiffs' employees to join defendant union.

In order to compel their employees to join defendant union, it would be necessary for plaintiffs to discharge employees unless they joined that union. In effect, therefore, defendants' purpose of pressuring plaintiffs to compel their employees to join the defendant union amounted to a purpose of pressuring plaintiffs to discharge their employees unless they joined that union.

We have, therefore, in the instant case, peaceful picketing against an employer, conducted on the sidewalk in front of the employer's premises by persons who were never employed by that employer and who do not represent anyone who ever was, and conducted for the purpose of pressuring the employer to discharge his employees unless they join the union of those who are conducting the picketing.

After the decision in *American Federation of Labor* v. *Swing*, 312 U. S., 321, 85 L. Ed., 855, 61 S. Ct., 568, there was certainly room for doubt as to whether a state court could enjoin such picketing without conflicting with the right to free speech guaranteed by the federal Constitution.

See also *Senn* v. *Tile Layers Protective Union*, 301 U. S., 468, 81 L. Ed., 1229, 57 S. Ct., 857; *Thornhill* v. *Alabama*, 310 U. S., 88, 84 L. Ed., 1093, 60 S. Ct., 736; *Carlson* v. *California*, 310 U. S., 106, 84 L. Ed., 1104, 60 S. Ct., 746. But cf. *Valentine* v. *Christensen*, 316 U. S., 52, 86 L. Ed., 1262, holding that a state may prohibit use of its streets for distribution of advertising material.

Since the decision in the *Swing case*, the problems, with respect to infringement of the right of free speech by injunctions against picketing, have been considered in numerous decisions by the United States Supreme Court and by state courts of last resort, and have also been the subject of a considerable body of other legal literature. See for example *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S., 287, 85 L. Ed., 836, 61 S. Ct., 552; *Carpenters and Joiners Union of America* v. *Ritter's Cafe*, 315 U. S., 722, 86 L. Ed., 1143, 62 S. Ct., 807; *Bakery & Pastry Drivers & Helpers Local 802* v. *Wohl*, 315 U. S., 769, 86 L. Ed., 1178, 62 S. Ct., 816; *Cafeteria Employees Union* v. *Angelos*, 320 U. S., 293, 88 L. Ed., 58, 64 S. Ct., 126; *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S., 490, 93 L. Ed., 834, 69 S. Ct., 684; *Building Service Employers International Union* v. *Gazzam*, 339 U. S., 532, 94 L. Ed., 1045, 70 S. Ct., 784; *Hughes* v. *Superior Court*, 339 U. S., 460, 94 L. Ed., 985, 70 S. Ct., 718; *International Brotherhood of Teamsters* v. *Hanke*, 339 U. S., 470, 94 L. Ed., 995, 70 S. Ct., 773, 13 A.L.R. (2d), 631; *Local Union No. 10* v. *Graham*, 345 U. S., 192, 97 L. Ed., 946, 73 S. Ct., 585; annotations at 11 A.L.R. (2d), 1338; 93 L. Ed., 1151, 1186 *et seq.*; 94 L. Ed., 973, 975 *et seq.*; Teller, Picketing and Free Speech, 56 Harvard Law Review, 180; Dodd, Picketing and Free Speech: A Dissent, 56 Harvard Law Review, 513 Teller Picketing and Free Speech: A Reply, 56 Harvard Law Review, 532; Jaffe, In Defense of the Supreme Court's Picketing Doctrine, 41 Michigan Law Review (1943), 1037.

As a result, it may fairly be said that it is difficult to rescue the principles of law decided from the ocean of words in which they are submerged. For this reason, and because many of these cases were recently reviewed by Judge Hart in his opinion in *W. E. Anderson Sons Co.* v. *Local Union No. 311,* 156 Ohio St., 541, 104 N. E. (2d), 22, we will merely state our conclusions as to the principles of law which have in our opinion now been established by the decisions of the Supreme Court of the United States, to the extent that those principles indicate whether or not the injunction against picketing in the instant case conflicts with the right to free speech guaranteed by the federal Constitution; and we will quote briefly some of the reasoning which was used in those decisions and which we believe supports our conclusions.

In our opinion, where the public policy of a state regards picketing of the kind involved in the instant case as unlawful, a state court may enjoin such picketing without infringing the right of free speech guaranteed by the Fourteenth Amendment to the federal Constitution; and the fact, that such public policy has been found by the courts of that state to be a part of its common law instead of being expressed by its Legislature in statutory form, is immaterial.

Thus in *Building Service Employers Intl. Union* v. *Gazzam, supra* (339 U. S., 532), it is said in the court's opinion:

> "This court has said that picketing is in part an exercise of the right of free speech guaranteed by the federal Constitution. * * * But since picketing is more than speech and establishes a *locus in quo* that has far more potential for inducing action or nonaction than the message the pickets convey, this court has not hesitated to uphold a state's restraint of acts and conduct which are an abuse of the right to picket rather than a means of peaceful and truthful publicity. * * *
>
> "* * *

"The state of Washington has by legislative enactment declared its public policy on the subject of organization of workers for bargaining purposes. * * * Under the so-enunciated public policy of Washington, it is clear that workers * * * shall be free from the coercion, interference, or restraint of *employers of labor* in the designation of their representatives for collective bargaining. Picketing of an employer to compel him to coerce his employees' choice of a bargaining representative is an attempt to induce a transgression of this policy, and the state here restained the advocates of such transgression from further action with like aim. To judge the wisdom of such policy is not for us; ours is but to determine whether a restraint of picketing in reliance on the policy is an unwarranted encroachment upon rights protected from state abridgment by the Fourteenth Amendment.

"* * * An adequate basis for the instant decree is the unlawful objective of the picketing, namely, coercion by the employer of the employees' selection of a bargaining representative. * * *

"* * *

"Here, as in *Giboney*, the union was using its economic power with that of its allies to compel respondent to abide by union policy rather than by the declared policy of the state. * * * If respondent had complied with petitioners' demands * * * he would have thereby coerced his employees. The employees would have had no free choice as to whether they wished to organize or what union would be their representative."

Also, in *Hughes* v. *Superior Court, supra* (339 U. S., 460), it is said in the court's opinion:

"* * * while picketing is a mode of communication it is inseparably something more and different. Industrial picketing 'is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind

or another, quite irrespective of the nature of the ideas which are being disseminated.' * * * Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word. * * *

"* * * A state may constitutionally permit picketing despite the ingredients in it that differentiate it from speech in its ordinary context. * * * And we have found that because of its element of communication picketing under some circumstances finds sanction in the Fourteenth Amendment. * * * However general or loose the language of opinions, the specific situations have controlled decision. It has been amply recognized that picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent. Picketing is not beyond the control of a state if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives ground for its disallowance. * * *

"* * * The fact that California's policy is expressed by the judicial organ of the state rather than by the Legislature we have repeatedly ruled to be immaterial. * * *

"It is not for this court to deny to a state the right, or even to question the desirability, of fitting its law 'to a concrete situation through the authority given * * * to its courts.' * * * It is particularly important to bear this in mind in regard to matters affecting industrial relations which, until recently, have 'been left largely to judicial lawmaking and not to legislation.' "

See also *Local Union No. 10* v. *Graham, supra* (345 U. S., 192): *International Brotherhood* v. *Hanke, supra* (339 U. S., 470): *Giboney* v. *Empire Storage & Ice Co., supra*

(336 U. S., 490): and *Carpenters and Joiners Union* v. *Ritter's Cafe, supra* (315 U. S., 722).

The question remains whether the public policy of Ohio regards picketing of the kind involved in the instant case as unlawful. It has not been argued and we will not therefore consider whether such picketing is forbidden by the provisions of Section 1331.01 *et seq.*, Revised Code. In our opinion, picketing of the kind involved in the instant case is and will continue to be unlawful in Ohio until legislation making it lawful is adopted.

In the instant case, defendants by their picketing were endeavoring to advance their interests. This effort of defendants necessarily conflicted with the interests of plaintiffs in avoiding interference with their business and with the interests of plaintiffs' employees in avoiding interference with their jobs. Furthermore, it conflicted with the public interest in avoiding industrial strife. There is nothing in the record to show what interests of defendants will be advanced by this picketing other than their interest in getting additional members for their union. For example, there is not even any evidence that, because of such things as payment of low wages or long hours of employment, plaintiffs are enjoying a competitive advantage over others, who are engaged in the same business and are maintaining union standards and employing those whom defendants represent. Under such circumstances, Ohio is certainly reasonable in determining that it is against its public policy to permit the use of its streets and sidewalks (dedicated and opened to facilitate public travel and transportation. *Railway Co.* v. *Telegraph Assn.*, 48 Ohio St., 390, 27 N. E., 890, 29 Am. St. Rep., 559, 12 L. R. A., 534; *Callen* v. *Columbus Edison Electric Light Co.*, 66 Ohio St., 166, 180, 64 N. E., 141, 58 L. R. A., 782) to stir up industrial strife that does not exist and for the existence of which there is no apparent reason.

In our opinion, the holding of this court in *Crosby* v. *Rath*, 136 Ohio St., 352, 25 N. E. (2d), 934, requires the conclusion that the picketing involved in the instant case was unlawful and should be enjoined. It is true that the decision in the *Crosby case* might have been based upon the fact that the picketing involved in that case had been accompanied by violence. However, the opinion "by the court" does not base the decision upon that ground but upon the ground that picketing is unlawful where there is no dispute between the employer and his employees and where the picketing is conducted against the employer by persons having no connection with his employees and where it is conducted for the purpose of pressuring the employer to discharge his employees unless they become members of a union. Thus, in that case, this court reversed that part of the judgment of the Court of Appeals which had permitted picketing and boycotting and, in doing so, stated in an opinion "by the court":

> "* * * it is not even contended that in the instant case there is any dispute whatsoever between the plaintiff and her employees * * *. On the contrary, the only dispute in the instant case is between the plaintiff and the defendants with whom the plaintiff's employees have no connection. The thing upon which the defendants are insisting is that the plaintiff discharge her employees unless they become members of one of the defendant unions. There is no reason or convincing authority sustaining the contention of the defendants that they have the right to engage in picketing or boycotting under such circumstances. * * * this must be the law * * * the instant situation is concedely unaffected by statute."

It is argued that this court in *Grimes & Hauer, Inc.* v. *Pollock*, 163 Ohio St., 372, 127 N. E. (2d), 203, not only held that the public policy of Ohio does not oppose union

shop agreements, but also questioned the reasons it had given for the *Crosby case* decision. There are statements in the opinion, *but not in the syllabus,* which might lend support to such conclusions. Those statements were made in answer to the contention that, because of Section 164 (b), Title 29, U. S. Code, and because the common-law public policy of Ohio in effect establishes a "right to work" law, the state court could enjoin the picketing involved in that case. However, even if there had been a statutory "right to work" law in Ohio, the only effect of Section 164 (b), Title 29, U. S. Code, would have been to prevent the National Labor Relations Board from acting in disregard of that law, as, for example, in authorizing execution or application of a union shop agreement. As this court recognized in the syllabus of the *Grimes & Hauer case,* the plaintiff therein was entitled to relief under provisions of the Labor Management Relations Act. Therefore the denial to Ohio of the right to enjoin the picketing in the *Grimes & Hauer case* (a denial implied by reason of the doctrine of pre-emption announced in *Garner* v. *Teamsters, Chauffeurs & Helpers Local Union No. 776,* 346 U. S., 485, 98 L. Ed., 228, 74 S. Ct., 161) would not, to use the words of Section 164 (b), be "authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment."

However, in our opinion, it is not necessary to determine and we do not determine in the instant case whether there is in Ohio, apart from any statutory or constitutional provision therefor, any common-law public policy which in effect established a "right to work" law. Assuming that there is no such common-law public policy in Ohio, the common-law public policy of Ohio may still regard peaceful picketing as unlawful where there is no dispute between the employer and his employees and where the picketing is

conducted against the employer by persons who were never employed by him and who do not represent anyone that ever was so employed and where it is conducted for the purpose of pressuring the employer to compel his employees to become members of a union. As hereinbefore pointed out, it does; and an injunction against such picketing does not infringe upon the right to free speech guaranteed by the federal Constitution. In our opinion, the Fourteenth Amendment to the federal Constitution does not require a state to prohibit voluntary acquiesence in the demands of a union in order that such state may prohibit the union from exerting pressure by picketing to secure submission to such demands. Thus, it is said in the court's opinion in *International Brotherhood* v. *Hanke, supra* (339 U. S., 470):

> "Nor does the Fourteenth Amendment require prohibition by Washington also of voluntary acquiesence in the demands of the union in order that it may choose to prohibit the right to secure submission through picketing. In abstaining from interference with such voluntary agreements a state may rely on self-interest. In any event, it is not for this court to question a state's judgment in regulating only where an evil seems to get most conspicuous."

Also, in *Hughes* v. *Superior Court, supra* (339 U. S., 460), it is said in the court's opinion:

> "If because of the compulsive features inherent in picketing, beyond the aspect of mere communication as an appeal to reason, a state chooses to enjoin picketing to secure submission to a demand for employment proportional to the racial origin of the then customers of a business, it need not forbid the employer to adopt such a quota system of his own free will."

Since there is no claim that plaintiffs in the instant case were engaged in interstate commerce, the decisions in

Grimes & Hauer, Inc., v. *Pollock, supra,* and *Garner* v. *Teamsters, Chauffeurs & Helpers Local Union No. 776, supra,* are not applicable.

Judgment affirmed.

WEYGANDT, C.J., MATTHIAS, HART, STEWART and BELL, JJ., concur.

OPINION: ZIMMERMAN, J., DISSENTING.

As I view the matter, the vital question in this case, under the facts presented, is relatively simple. That question is, where no dispute exists between an employer and his non-union employees, may members of a labor union who are directly interested picket and banner the employer's premises in a quiet and orderly manner to induce unionization by publicizing the status of the employer's establishment after negotiations for unionization have failed?

There is neither a constitutional provision nor any statutory law in Ohio which prohibits such activities, and I can not agree with my associates that "the public policy of Ohio, as determined by its courts, regards picketing against an employer as unlawful where there is no dispute between the employer and his employees and where the picketing is conducted by persons who were never employed by that employer * * *."

In the case of *Crosby* v. *Rath,* 136 Ohio St., 352, 25 N. E. (2d), 934, relied on in the majority opinion as establishing such public policy, violence and intimidation accompanied the picketing. And the case of *W. E. Anderson Sons Co.* v. *Local Union No. 311,* 156 Ohio St., 541, 104 N. E. (2d), 22, was decided mainly on the ground that the picketing there constituted an unlawful "secondary boycott."

It seems to me that the question stated above requires an affirmative answer under the decision of the Supreme Court

of the United States in *American Federation of Labor* v. *Swing*, 312 U. S., 321, 85 L. Ed., 855, 61 S. Ct., 568.

There, as stated in the opinion, the precise issue was:

> "Is the constitutional guaranty of freedom of discussion infringed by the common-law policy of a state forbidding resort to peaceful persuasion through picketing merely because there is no immediate employer-employee dispute?"

The court answered that question in the affirmative and said in the course of the opinion:

> "A state can not exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace. * * * The right of free communication can not therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ. Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in *Thornhill's case* (*Thornhill* v. *Alabama*, 310 U. S., 88, 84 L. Ed., 1093, 60 S. Ct., 736). 'Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the federal Constitution.' *Senn* v. *Tile Layers Protective Union*, 301 U. S., 468, 478 (81 L. Ed., 1229, 1236, 57 S. Ct., 857)."

The *Swing case* has never been expressly overruled, nor do I find in later cases that the principle announced in that case has been abandoned or modified in any essential respect.

In my view, the majority opinion proceeds on an erroneous basis and reaches an erroneous conclusion, with the result that appellants are denied the exercise of a constitutional right.

I would, therefore, reverse the judgment of the Court of Appeals and remand the cause to that court with instructions to dissolve the injunction and enter judgment for the appellants.

MOTION TO DISMISS APPEAL

No. 34214

(Filed November 17, 1954.)

(CAPTION)

Plaintiffs-appellees, Harry Chucales, Gus Chucales and Lula Chucales, dba State Bar and Grill, respectfully move this honorable court to dismiss this appeal filed as of right, for the reason there are no debatable constitutional questions involved in said cause.

/s/ H. J. MICKLETHWAITE
/s/ LEE O. FITCH
402 Masonic Temple
Portsmouth, Ohio
Attorneys for Plaintiffs-Appellees

ASSIGNMENT OF ERRORS

Case No. 34214

(Filed April 29, 1955.)

(CAPTION)

1. The Court below erred in abridging the rights of defendants to picket peacefully, as guaranteed by the Constitutions of the United States and the State of Ohio, by enjoining picketing on the basis of facts not sustained by the evidence.

2. The Court below erred in failing to find that members of a labor union may picket the establishment of an employer even though there is no dispute between that employer and his own employees, in the absence of any other factors, in accordance with rights guaranteed by the Ohio and United States Constitutions.

3. The Court below erred in finding that picketing for the purpose of obtaining a union shop or closed shop contract is picketing for an illegal purpose and enjoinable, thereby abridging the rights of the defendants to picket peacefully as guaranteed by the United States and Ohio Constitutions.

MOTION TO CERTIFY RECORD

No. 34214

(Filed August 21, 1954.)

(CAPTION)

William O. Royalty, George Slaughter, and Local No. 429 of the Hotel & Restaurant Employees and Bartenders

International Union, defendants-appellants herein, respectfully move this honorable Court for an order directing that the Court of Appeals for the County of Scioto, Ohio, certify its record to this court, for hearing and decision, in the above entitled action which is numbered 616 on the docket of said Court of Appeals.

The final order and judgment of said Court of Appeals was entered on the 26th day of July, 1954, and defendants-appellants have filed in said court and in this court their notice of appeal as required by law. In said order and judgment, the said Court of Appeals issued an injunction enjoining the defendants-appellants, either collectively or individually, their agents and sympathizers, from picketing plaintiffs-appellees' place of business; and that they be enjoined from interfering in any way, directly or indirectly, with the operation of plaintiffs-appellees' business, any of plaintiffs-appellees' customers, or any other person entering upon plaintiffs-appellees' premises. In effect, said judgment and order affirmed the judgment rendered by the Common Pleas Court of said county.

Defendants-appellants further represent that they have heretofore filed Notice of Appeal in the Court of Appeals and a similar notice in this court as required by law, and further that said case is one of public and great general interest and that prejudcial error has been committed in the order, judgment, and proceedings had in said Court of Appeals; that on the question of law in this cause, there is a conflict of opinions in the various courts of appeal and the various courts of common pleas of this state; that under Article IV, Section 2 of the Constitution of the State of Ohio, and by reason thereof, this Honorable Court has jurisdiction to and ought to review said judgment.

WHEREFORE, defendant-appellant makes application

for an order directing said Court of Appeals to certify its record to the Supreme Court.

J. W. BROWN
BEN GETTLER
Attorneys for Defendants-
Appellants

NOTICE OF APPEAL

No. 34214

(Filed August 14, 1954.)

(CAPTION)

William O. Royalty, George Slaughter, and Local No. 429 of the Hotel and Restaurant Employees and Bartenders International Union, the above named defendants-appellants, hereby give notice of appeal to the Supreme Court of Ohio from the judgment and final order rendered by the Court of Appeals of Scioto County on the 26th day of July, 1954, enjoining the defendants-appellants from picketing plaintiffs-appellees place of business, interfering with the operation of plaintiffs-appellees' business, plaintiffs-appelees' customers or persons entering plaintiffs-appellees' premises.

This appeal is on questions of law and is taken:

1. Of right, in a case involving a constitutional question, and
2. On condition that a motion to certify be allowed by the Supreme Court.

/s/ J. W. BROWN
/s/ BEN GETTLER
Attorneys for Defendants-
Appellants

DULY ACKNOWLEDGED.

OPINION OF COURT OF APPEALS

No. 616

(Filed June 30, 1954.)

(CAPTION)

APPEAL ON QUESTIONS OF LAW AND FACT

BY THE COURT:

This appeal was presented in this Court on an agreed statement of facts from which the defendants-appellants conclude in their reply brief that the sole question presented to this Court is as follows:

> "Does the union have the right to engage in peaceful picketing when none of plaintiffs' employees are members of defendant union?"

The important portions of the agreed statement of facts set forth that the plaintiffs are doing business as State Bar and Grill at 603 Chillicothe Street in the city of Portsmouth, Ohio, a restaurant business catering to the general public, and employing therein persons who were not members of the defendants-appellants union and at all times they advised their employers that they did not wish to become members of the Union; the defendant-appellant Local No. 429 is a labor organization and an unincorporated association affiliated with the Hotel and Restaurant Employees and Bartenders International Union, which is in turn affiliated with the American Federation of Labor; and said Local No. 429 is composed of persons employed in the hotel, restaurant and bar industries in Scioto County, Ohio; that William O. Royalty is the acting secretary of the local, and George Slaughter is the acting agent of the local union.

Before picketing this place of business each time Harry Chucales was approached by either Royalty or Slaughter,

Chucales advised them to take the matter up with their employees. Both Royalty and Slaughter were requesting that the plaintiffs-appellees commence negotiations with the Union for a Union contract, and Slaughter on the 28th day of January, 1953, asked Harry Chucales if he was going to run a union place, and requested that he enter into a contract with Local 429, whereupon Chucales told Slaughter to talk with the employees of the restaurant and determine from them whether or not they desired to join the union. Slaughter did not contact the employees, but within an hour picketing was commenced on the sidewalk in front of the State Bar and Grill, consisting of one picket, the picketing was peaceful and the picket carried a sign stating "This place does not employ members of Bartenders, Hotel and Restaurant Employees and Miscellaneous Workers Local No. 429, American Federation of Labor." The picket was a member of Local 429 but not an employee of the plaintiffs-appellees. After picketing started, upon being approached by Gus Chucales, each employee of the State Bar and Grill stated that they were not members of Local No. 429 and did not desire to join Local No. 429.

Under these circumstances, there can be no doubt that the picketing in this case was conducted for the sole purpose of union organization of the plaintiffs-appellees' place of business. From the banner or sign carried by the picket, the purpose of the organization was that the plaintiffs-appellees employ members of the defendant union. This could only be accomplished under the circumstances of this case in two manners: First, – for the present employees of the plaintiffs-appellees to join the defendant union, or Second, – for them to be discharged and for the plaintiffs-appellees to employ employees who had such membership.

The defendants-appellants cannot escape these conclusions under their particular efforts of organization through

employer negotiations. For this reason this case falls squarely within the pronouncement of the Supreme Court of the State of Ohio in the case of *Crosby* v. *Rath*, 136 Ohio State 352. Picketing or bannering, for the purpose of bringing pressure upon an employer to compel his employees to join a union, is for an illegal purpose and will be enjoined. The case of *Bean, appellant*, v. *Local No. 698, et al, appellees*, Ohio Appellate Reports, Vol. 94, Page 361, is decisive of this case. It would serve no useful purpose for this Court to further discuss the law of the case with comments on United States Supreme Court decisions and State of Ohio Supreme Court decisions, noting either distinctions of, or exceptions from, the principles of law contained therein.

Judgment for plaintiffs-appellees.
Dated June 29th, 1954.
GILLEN, P.J., McCURDY and COLLIER, JJ., concur.

OPINION OF COURT OF COMMON PLEAS

No. 40807

(Filed, Court of Common Please, Scioto County, September 23, 1953.)
(Filed, Court of Appeals, Scioto County, October 28, 1953.)
(Filed, The Supreme Court of Ohio, August 25, 1954.)

(CAPTION)

The facts in this case are embodied in a brief stipulation of facts, such that a further recitation thereof is unnecessary in this opinion.

Defendants' brief would indicate that there is only one question before the Court, which it sets forth on page 4 as follows: "Does a union have the right to engage in peaceful

picketing when none of plaintiffs' employees are members of the defendant union?"

Defendants would have the Court believe that its only "purpose of the picketing was to inform the public that plaintiffs establishment was not a union establishment and that plaintiffs did not employ members of the defendant local union; so that members of the public, sympathetic to organized labor would, knowing the facts, patronize establishments which were union establishments and which employed members of the defendant union."

If that were the case, then there would be no need for defendants' agent to contact plaintiffs to seek them to enter into a contract. Defendants' agent, however, did seek negotiations for a contract with defendant union. This plainly was not to carry out the purpose of advertising, but by entering into a contract, the result would be to force or coerce plaintiffs' employees to join a union. It is plain that plaintiffs are not allowed to coerce their employees in any way.

Public policy was originally laid down for Ohio in the case of *Crosby v. Rath*, which held that peaceful picketing or bannering for the purpose of bringing pressure upon an employer to compel his employees to join a union is for an illegal purpose and will be enjoined.

This public policy has been followed by the Ohio Supreme Court in the case of *W. E. Anderson Sons Company v. Local Union No. 311* since the decision of the United States Supreme Court on May 8, 1950.

See also the decision of the Court of Appeals of the Ninth Judicial District of Ohio in the case of *Bean v. Local Union No. 698* dated July 1, 1953.

Quoting the *Bean Case*, "The sole question for determination here is this: May a union in the absence of a dispute between employer and employees, or between the union and the employer or employees, engage in peaceful picket-

ing for the purpose of bringing pressure to bear upon the employer to require his employees to join a union? In other words, may peaceful picketing for organizational purposes of the union be lawfully conducted?

"We think the question stated has been completely answered in the negative by the decision of *Crosby* v. *Rath*."

An injunction, as prayed for, may issue. An entry may be drawn accordingly.

/s/ HARLEY MEYER
Judge, Sitting By Assignment.

A BILL

(CAPTION)

To declare public policy on the right to work and on "Hot Cargo" or "Secondary Boycott", to define "Hot Cargo" or "Secondary Boycott" and to invalidate contracts and any renewal or extension of existing contracts hereafter entered into in derogation thereof; to declare unlawful: (1) any interference by force or violence with the right to work, (2) any requirement of membership in or support of or non-membership or non-support of a labor organization as a condition of employment, (3) any picketing as to interfere with free ingress to or egress from any place of employment, or so as to obstruct or interfere with the use of ways and means of travel, transportation or conveyance thereto or therefrom, (4) any picketing where no labor dispute exists, and, (5) the use of "Hot Cargo" or "Secondary Boycott;" and to make a violation thereof a misdemeanor, and to provide civil and criminal remedies and punishments therefor.

Be it enacted by the General Assembly of the State of Ohio.

Section 1. That sections 2923.42 to 2923.45, inclusive,

and 2923.99 of the Revised Code, be enacted to read as follows:

Sec. 2923.42. To make operative the provision of the constitution of Ohio which declares that "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety." It is hereby declared to be the public policy of Ohio: (1) That the exercise by any person of the right to work shall not be interfered with because of his membership or non-membership in any labor organization; and (2) That "Hot Cargo" or "Secondary Boycott,"—which, as here used, means any combination, agrement, arrangement, or understanding, pursuant to, or in accordance with which, or by reason whereof employees refuse to handle goods or perform services for their employer because of a labor dispute, or because of an agreement, between some other employer and his employees or their representatives — is an unlawful interference with the right of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining happiness and safety, is against public policy and an illegal combination or conspiracy. Contracts and any renewals or extensions of existing contracts hereafter entered into purporting to require membership or non-membership in or support or non-support of a labor organization as a condition of employment, or purporting to sanction, require or authorize a secondary boycott, as herein defined, are prohibited, and are illegal and of no effect.

Sec. 2923.43. No person, acting alone or in concert with one or more persons shall by force, intimidation or violence, or threats thereof, or by violent and insulting language, directed against any person or member of the family

of any person, interfere or attempt to interfere, with such person in the exercise of his right to work or to engage in any lawful violation or business activity, or to enter or leave any place of his employment, or to receive, ship or deliver materials, goods or services not prohibited by law, or compel, or attempt to compel such person to join, support, or refrain from joining or supporting any labor organization; or engage in picketing in any manner as to interfere with the free ingress to, or egress from, such person's place of employment, or as to obstruct or interfere with the free use of roads, street highways, sidewalks, railroads or with the use of ways and means of travel, transportation or conveyance thereto or therefrom.

Sec. 2923.44 No person, acting alone or in concert with one or more persons, shall picket, or induce others to picket the premises, the supply or delivery vehicles, the customers or employees of any person, firm or corporation engaged in business or interfere in any manner with any person or persons desiring to transact business with any such person, firm or corporation where no labor dispute exists between such person, firm or corporation and its employees and their representatives, even though such picketing be for the purpose only of obtaining the right to act as bargaining agent for such employees.

Sec. 2923.45 No person, acting alone or in concert with one or more persons, shall by force, intimidation, or violence, or threats thereof, or by violent or insulting language, or other coercive means, cause any person, firm or corporation, desiring to transact business with an employer having a labor dispute, to refrain from doing so through fear or loss or damage to itself; and no employee, pursuant to, in accordance with, or by reason of any combination, agreement, arrangement or understanding, shall refuse to handle goods or perform services for his employer because of a

labor dispute or because of an agreement between some other employer and his employees or a labor organization.

Sec. 2923.99 Whoever violates sections 2923.43, 2923.44, or 2923.45, of the Revised Code shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than one hundred nor more than one thousand dollars, and each day such violation continues shall be deemed a separate offense, punishable as such, and; in addition thereto, whoever violates sections 2923.42, 2923.43, 2923.44 or 2923.45 of the Revised Code shall also be liable in damages to any person injured thereby.

Notwithstanding the punishments and remedies herein provided, any court of general equity jurisdiction may enjoin any picketing or interference with lawful picketing when necessary to prevent disorder, restrain coercion, protect life or property or promote the general welfare.

Section 2. The several sections, parts of sections, sentences, and parts of sentences of sections 2923.42 to 2923.45, inclusive, of the Revised Code, are declared to be separate and independent sections, parts of sections, sentences and parts of sentences, and a decision holding any section, part of section, sentence or part of sentence thereof for any reason to be unconstitutional and void shall not affect the validity of the remaining portions of sections 2923.42 to 2923.45, inclusive, of the Revised Code.

Section 3. The provisions of this act shall not apply to any lawful contract in force on the effective date hereof, but they shall apply in all respects to contracts executed thereafter and to any renewal or extension of any existing contract.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Office - Supreme Court
FILED
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HAROLD B. WILLEY,

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 782

WILLIAM O. ROYALTY, GEORGE SLAUGHTER, AND LOCAL NO. 429 OF THE HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION,
Petitioners,

vs.

HARRY CHUCALES, GUS CHUCALES AND LULA CHUCALES, dba State Bar and Grill,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENTS IN OPPOSITION

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 782

WILLIAM O. ROYALTY, GEORGE SLAUGHTER, AND LOCAL NO. 429 OF THE HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION,

Petitioners,

vs.

HARRY CHUCALES, GUS CHUCALES AND LULA CHUCALES, dba State Bar and Grill,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENTS IN OPPOSITION

THE OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported as follows: *Chucales, et al., d.b.a. State Bar and Grill, Appellees,* v. *Royalty, et al., Appellants,* 164 O.S. 214, — NE (2d) — and appears in the Appendix hereto (Appendix, p. 2a).

The opinion of the Court of Appeals of Scioto County is unreported and appears in the Appendix hereto (Appendix, p. 14a).

The opinion of the Common Pleas Court of Scioto County is unreported and appears in the Appendix hereto (Appendix, p. 17a).

JURISDICTION

(a) The judgment and decree of the Supreme Court of Ohio herein sought to be reversed is dated and entered October 26, 1955, (Appendix, p 1a).

(b) The statutory authority which confers jurisdiction on this Court is Title 28, U.S.C., Section 1257 (3), in that the petitioners claim rights and privileges under the Fourteenth Amendment (embracing the First Amendment) of the Constitution of the United States.

QUESTIONS PRESENTED

Question No. 1. Does an injunction prohibiting petitioners from picketing respondents' business establishment, based upon the facts as found to exist, being in violation of the "public policy" of the State of Ohio, violate petitioners' constitutional right?

Question No. 2. Can the "public policy" of a state be expressed by its judicial organ in the absence of legislative enactment?

Question No. 3. Has "public policy" with relation to picketing been established in the State of Ohio?

THE CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions which the case herein involves are: Amendment I of the Constitution of the United States as follows:

"Amendment I. (Religion, Free Speech, etc.)

> Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment XIV, paragraph 1, of the Constitution of the United States as follows:

"Amendment XIV. (Rights of Citizens.)

> 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioners are a trade union and its officers, known as Local No. 429 of the Hotel and Restaurant Employees and Bartenders International Union. Respondents are the owners and operators of a restaurant and tavern in the City of Portsmouth, Ohio, known as "State Bar and Grill".

Prior to January 28, 1953, the petitioner Royalty, acting as agent for Local No. 429, approached respondents in their place of business and requested that respondents commence negotiations with petitioner, Local No. 429, for a union contract. Respondents refused and told petitioners to take the matter up with respondents' employees. Thereafter, again prior to January 28, 1953, Royalty casually

reminded respondents of his previous request, but there was no extended discussion of the matter.

On January 28, 1953, the petitioner Slaughter, acting as agent for petitioner, Local No. 429, approached respondent Harry Chucales and asked him if he was going to run a union place, and requested that he enter into a contract with petitioner, Local No. 429. Respondent Harry Chucales told the petitioner, George Slaughter, to talk with respondents' employees as to whether or not they desired to join the union, but petitioner did not contact respondents' employees, requesting them to join Local No 429, and left respondents' establishment. Within an hour thereafter picketing commenced. Pickets carried signs stating:

> "This place does not employ members of Bartenders, Hotel and Restaurant Employees and Miscellaneous Workers Local No. 429, American Federation of Labor."

On January 28, 1953, shortly after the picketing started, respondent Gus Chucales approached each employee of the State Bar & Grill and asked each employee if he or she was a member of Local No. 429, or if he or she desired to join Local No. 429, and each employee replied in the negative to both questions.

The picketing was at all times conducted on the sidewalk in front of respondents' business establishment and was at all times peaceful; and the picketing consisted of one picket who was a member of Local No. 429 but who was not, and never had been, an employee of respondents. At no time relevant to the issue was any of respondents' employees members of the petitioner, Local No. 429.

On January 28, 1953, after petitioners commenced picketing respondents' place of business, respondents sought an

injunction in the Common Pleas Court of Scioto County, Ohio.

The respondents alleged as grounds for injunction that petitioners did not represent any of respondents' employees; that no labor dispute existed between respondents and their employees; and that such picketing and exhibition of said sign in front of respondents' restaurant were an unlawful violation of respondents' constitutional rights (Tr. p. 2), and prayed that: "a temporary injunction be granted enjoining defendants, either collectively or individually, their agents and sympathizers, from picketing plaintiffs' place of business; that said sign be removed and that they be enjoined from interfering in any way, directly or indirectly, with the operation of plaintiffs' business, any of their customers, or any other person entering upon plaintiffs' premises; that upon final hearing hereof said injunction be made permanent and for other and further relief as may be just and equitable."

On January 28, 1953, Common Pleas Court granted a temporary restraining order as prayed for, which continued in effect until the matter was brought on for trial after answer. At that time the parties entered into a stipulation of facts (Bill of Exceptions, Tr. p. 6), which are substantially as set forth above.

On the basis of the aforementioned stipulation, the Court ordered that the injunction heretofore granted be made permanent (Tr. p. 12).

Appeal on law and fact was taken to the Court of Appeals of Scioto County, Ohio, and it was agreed that the aforementioned stipulation of facts entered into between the parties below would constitute an Agreed Statement of Facts containing all evidence for purposes of appeal (Tr. p. 13).

On June 30, 1954, the Court of Appeals found that the picketing was for the purpose of bringing pressure upon

an employer to compel his employees to join a union; that this is for an illegal purpose and should be enjoined; and that the case falls squarely within the pronouncement of the Supreme Court of the State of Ohio in the case of *Crosby* v. *Rath*, 136 O. S. 352, 25 N. E. 2d 934.

Thereupon, on July 26, 1954, the court entered an order granting an injunction (Tr. p. 17).

An Appeal as of Right and Motion to Certify the Record were filed in the Supreme Court of Ohio. Respondents filed a Motion to Dismiss the Appeal as of Right. On January 15, 1955, petitioners' Motion for an Order to Certify was overruled by the Court and respondents' Motion to Dismiss the Appeal as of Right was likewise overruled. The case therefore stood in the Ohio Supreme Court upon appeal as of right.

On October 26, 1955, the Ohio Supreme Court in an opinion by Taft, J., found that the facts of the case contained in the Agreed Statement of Facts and those "properly inferable therefrom" sustained the granting of the injunction by the Court of Appeals and held:

> "1. Where parties agree that certain facts are the facts upon which the court should consider a case, the court, in deciding such case, may properly base its decision in part upon other facts that may reasonably be inferred from the facts agreed upon.
>
> "2. The public policy of Ohio, as determined by its courts, regards picketing against an employer as unlawful where there is no dispute between the employer and his employees and where the picketing is conducted by persons who were never employed by that employer and who do not represent anyone who ever was, and where it is conducted for the purpose of pressuring the employer to compel his employees to join the union of those conducting the picketing.

"3. Where the public policy of a state regards such picketing as unlawful, a state court may enjoin such picketing, even though it is peaceful, without infringing the right of free speech guaranteed by the federal Constitution; and the fact, that such public policy has been found by the courts of that state to be a part of its common law instead of being expressed by its Legislature in statutory form, is immaterial.

"4. The Fourteenth Amendment to the federal Constitution does not require a state to prohibit voluntary acquiescence in the demands of a union in order that such state may prohibit the union from exerting pressure by picketing to secure submission to such demands."

The foregoing is the syllabus in the case of Chucales v. Royalty, 164 O. S. 214, which is the case before this court on Petition for Writ of Certiorari.

The opinion of the Supreme Court of Ohio is based on the precise facts in this case, in that the actions of the petitioners violated the public policy of Ohio as established and accepted by Ohio courts and should therefore be enjoined, and is not in conflict with legislative enactment of the State of Ohio.

ARGUMENT

The judgment of the Supreme Court of Ohio in the present case, for which review is sought in this Court, was to the effect that picketing of the kind involved in this case is unlawful in Ohio.

The Supreme Court of Ohio based its decision on the particular set of facts presented in the case and determined that the actions of the petitioners violated the "public policy" of Ohio and were properly enjoined.

On the evidence submitted, the decision of the Supreme Court of Ohio was manifestly correct. There is no conflict of decision of cases which control, and the judgment of the Ohio Supreme Court does not raise a new or important constitutional question which warrants granting of a writ of certiorari.

I.

THE DECISION BELOW IS CORRECT

The decisions of the courts below were all based on the evidence contained in the Agreed Statement of Facts (Tr. p. 13) (Appendix, p. 18a).

The court below considered this case on the evidence and could have come to no other conclusion than that petitioners and their agents were attempting to coerce respondents to force their employees to join petitioners' Union as a condition of employment.

This was the finding of the Court of Common Pleas, and the following is quoted from its opinion (Opinion, Appendix, p. 17a):

> "Defendants' brief would indicate that there is only one question before the court, which it sets forth on page 4 as follows: 'Does a union have the right to engage in peaceful picketing when none of plaintiffs' employees are members of the defendant union?'
>
> "Defendants would have the Court believe that its only 'purpose of the picketing was to inform the public that plaintiffs' establishment was not a union establishment and that plaintiffs did not employ members of the defendant local union; so that members of the public, sympathetic to organized labor would, knowing the facts, patronize establishments which were union establishments and which employed members of the defendant union.'
>
> "If that were the case, then there would be no need for defendants' agent to contact plaintiffs to seek them

to enter into a contract. Defendants' agent, however, did seek negotiations for a contract with defendant union. This plainly was not to carry out the purpose of advertising, but by entering into a contract, the result would be to force or coerce plaintiffs' employees to join a union. It is plain that plaintiffs are not allowed to coerce their employees in any way."

This was also the finding of the Court of Appeals, and the following is quoted from its opinion (Opinion, Appendix, p. 14a):

> "Under these circumstances, there can be no doubt that the picketing in this case was conducted for the sole purpose of union organization of the plaintiffs-appellees' place of business. From the banner or sign carried by the picket, the purpose of the organization was that the plaintiffs-appellees employ members of the defendant union. This could only be accomplished under the circumstances of this case in two manners: First,—for the present employees of the plaintiffs-appellees to join the defendant union, or Second,—for them to be discharged and for the plaintiffs-appellees to employ employees who had such membership.
>
> "The defendants-appellants cannot escape these conclusions under their particular efforts of organization through employer negotiations. For this reason this case falls squarely within the pronouncement of the Supreme Court of the State of Ohio in the case of Crosby v. Rath, 136 Ohio State 352. Picketing or bannering, for the purpose of bringing pressure upon an employer to compel his employees to join a union, is for an illegal purpose and will be enjoined."

The Supreme Court of Ohio has repeatedly held as stated in paragraph 1 of the syllabus in this case, set forth on page 6 of this brief.

There is no evidence of any dispute between petitioners and respondents concerning wages, hours, or conditions,

or that the respondents were enjoying a competitive advantage over others who are engaged in the same business and are maintaining union standards and employing those whom petitioners represent.

The wording of the banner in and of itself is conclusive that petitioners were picketing because respondents' employees were not members of petitioners' Union. Petitioners had never contacted the employees to ascertain whether they wanted to join this particular Union, but had demanded that the respondents enter into a contract which, if entered into, would require respondents' employees to join petitioners' Union. Such a contract would require respondents to bargain with the Union as a representative of their employees. Had respondents complied with the Union's demands, signed one of the contracts and lived up to its terms, respondents would thereby have to coerce their employees into joining the Union as a condition of employment. Respondents' employees would have had no free choice as to whether they wished to organize or what union would be their representative.

Respondents would have been forced to discharge any of their employees who refused to become members of the petitioners' Union. Respondents would also have been forced to recognize petitioners' Union as the bargaining agent for their employees, thus depriving said employees from a free choice in selecting their own bargaining agent.

Petitioners contend that picketing under the circumstances in the instant case comes within the protection of "freedom of speech" and that there is no illegal objective connected with the picketing of respondents' establishment. The objective of the picketing is illegal in that it seeks to force upon respondents' employees petitioners' Union as their bargaining agent against their will and to force them to become members of the Union as a condition

of employment. If this were not the objective of petitioners' Union, there would have been no reason for the Union to have contacted the respondents at any time requesting them to recognize it as bargaining agent for respondents' employees and enter into a Union contract. Such picketing is unlawful under the facts in this case and violates public policy of the State of Ohio.

The General Assembly of the State of Ohio has not enacted "right to work" legislation; but the public policy in the State of Ohio has been expressed by its courts.

In the case of *Crosby* v. *Rath*, 136 O. S. 352, 25 NE 2d 934, in which the facts are identical with those in the instant case, with the exception of the violence indicated in the *Crosby* case, it was held that picketing under the circumstances involved in that case was illegal and violated Ohio public policy. See also *La France Electrical Construction and Supply Co.* v. *International Brotherhood of Electrical Workers*, 108 O. S. 61, 138 N. E. 899.

This Court in the cases of *Hughes et al* v. *Superior Court of California*, 339 U. S. 460; *International Brotherhood of Teamsters* v. *Hanke*, 339 U. S. 470; and *Building Service Employees Local 262* v. *Gazzam*, 339 U. S. 532, has determined that a state is not required to tolerate in all places and in all circumstances even peaceful picketing by an individual.

This Court has also determined that it is immaterial in respect to the constitutional issue that a state policy is expressed by its Supreme Court rather than by its legislature.

The 14th Amendment leaves the states free to distribute the powers of government, as they will, between their legislative and judicial branches. It is, therefore, immaterial whether the state policy is expressed by the judicial organ of a state rather than by the legislature. *Castillo* v. *McConnico*, 168 U. S. 674, 18 S. Ct. 229, 233, 42 L. Ed. 622; *Hebert* v. *State of Louisiana*, 272 U. S. 312, 316, 47 S.

Ct. 103, 194, 71 L. Ed. 270, 48 A.L.R. 1102; *Nashville, C. & St. L. R. Co.* v. *Browning*, 310 U. S. 362, 369, 60 S. Ct. 968, 972, 84 L. Ed. 1254; *Skiriotes* v. *State of Florida*, 313, U. S. 69, 79, 61 S. Ct. 924, 930, 85 L. Ed. 1193; *Snowden* v. *Hughes*, 321 U. S. 1, 11, 64 S. Ct. 397, 402, 88 L. Ed. 497; *Dreyer* v. *People of State of Illinois*, 187 U. S. 71, 83-84, 23 S. Ct. 28, 32, 47 L. Ed. 79; *Soliah* v. *Heskin*, 222 U. S. 522, 524, 32 S. Ct. 103, 56 L. Ed. 294; *Erie R. Co.* v. *Board of Public Util. Com's*, 254 U. S. 394, 413, 41 S. Ct. 169, 172, 65 L. Ed. 322; *Prentis* v. *Atlantic Coast Line R. Co.*, 211 U. S. 210, 225, 29 S. Ct. 67, 69, 53 L. Ed. 150; *Keller* v. *Potomac Elec. Power Co.*, 261 U. S. 428, 443, 43 S. Ct. 445, 448, 67 L. Ed. 731; *State of Missouri* v. *Dockery*, 191 U. S. 165, 170-171, 24 S. Ct. 53, 54, 48 L. Ed. 133, 63 L.R.A. 571.

Ohio courts have followed the almost universal rule that employees had the right to peacefully strike, picket or engage in a primary boycott, if their purposes were found by the courts to be lawful. Among these lawful purposes were betterment of wages, hours, or conditions of employment. Thus, if picketing were for a lawful purpose and lawfully conducted, it was not subject to injunctive relief in the Ohio courts. Conversely, if picketing was for either an unlawful purpose or unlawfully conducted, it was subject to restraint.

There are other Ohio court decisions forbidding peaceful picketing under certain circumstances, as follows:

Picketing of employee entrances used exclusively by certain employees for the purpose of causing a breach of contract between the employer and other unions. *Sterling & Welch Co.* v. *Marie Duke et al*, 33 O. O. 482, affirmed by the Ohio Court of Appeals, December 5, 1946.

The picketing of residences of employees working during a strike. *Pike Machinery Company* v. *DeMore et al*, Cuyahoga County Common Pleas Court, No. 578201. Affirmed by the Ohio Court of Appeals. 36 O. O. 342 (1947).

The picketing of an establishment whose employees had defeated a union in representative election. *Worth Clothes* v. *Amalgamated Clothing Workers,* Mahoning County Common Pleas Court, No. 130702.

In the case of *Richman Bros. Co., plaintiff,* v. *Amalgamated Clothing Workers of America, an unincorporated association, et al,* decided April 14, 1953, by Common Pleas Court of Cuyahoga County, Ohio, the court found that the public policy of Ohio is as set forth in the case of *Crosby* v. *Rath,* 136 O. S. 352, 25 N. E. 2d 934, and that the picketing in this case violated the public policy of Ohio.

The facts in the Richman Bros. case are the same as those in the case now before this Court. Richman Bros. had no employees who were members of the union; there was no labor dispute between employer and employees; the union never contacted Richman Bros.'s employees to induce them to join the union, but had contacted the employer, insisting that he negotiate a contract with the union, which contract would have required the employer to coerce his employees into joining the union.

While the injunction in the Richman case has now been dissolved, this was done for the reason that the Ohio courts do not have jurisdiction when the employer is engaged in interstate commerce. The Richman Bros. Co. is engaged in interstate commerce, and the jurisdiction in such cases has been given exclusively to the National Labor Relations Board.

Cause No. 645411, in the Court of Common Pleas, Cuyahoga County, Ohio, wherein Judge A. V. Baumann, as of March 19, 1953, stated in such cases as is now before this Court that the case of *Crosby* v. *Rath,* 136 O. S. 352, 25 N. E. 2d 934, is still the leading authority in Ohio on the subject of picketing.

W. E. Anderson Sons Co. v. *Local Union No. 311,* 156 O. S. 541, 104 N. E. 2d 22, decided by the Supreme Court

of Ohio on February 13, 1952. Although this case involved a question of secondary boycott, the case of *Crosby* v. *Rath* was cited and the principle decided in *Crosby* v. *Rath* re-established. In the *Anderson case* we find on page 561 the following:

> "Court decisions now seem to firmly establish the rule that picketing or bannering as a means of the exercise of the right of free speech will be afforded constitutional protection so long as it is lawfully conducted but if it becomes unlawful then it falls within the category of a civil wrong and must be governed by the law of torts. In other words, the constitutional guaranty of the right of free speech is predicated upon the lawful exercise of such right and if, through conspiracy or unlawful conduct, the result of its exercise unlawfully injures another in his property rights, the guaranty ceases and the exercise of the claimed right by such means may be enjoined or prohibited."

In the case of *Local Union No. 10, United Association of Journeymen, Plumbers and Steamfitters of the United States and Canada, of the American Federation of Labor, et al* v. *O. J. Graham, O. T. Graham and E. M. Graham, partners, trading as Graham Brothers*, reported in 345 U. S. 192, the court again decided that the policy of a state was the province of that particular state. In this case the court of Virginia found from the evidence that the picketing was to induce subcontractors to discharge their non-union help, and that the picketing was done in such a place and in such a manner that it caused the union men to stop work and thus slow the project to a general standstill. In a statute passed by the legislature of Virginia, it is declared to be the public policy of Virginia that the rights of a person to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The Virginia court found that the picketing

was in violation of the public policy of the State of Virginia, and therefore granted an injunction against picketing. This Court upheld the decision of the Virginia court, thereby again establishing that picketing in violation of a state policy may be enjoined by the state court. This case was decided March 16, 1953, by this Court.

Following the rulings handed down recently by this Court, the Supreme Court of Michigan in the case of *Postma et al* v. *Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 406, et al*, decided September 3, 1952, held:

1. An attempt to force employees to become unionized, either directly or indirectly, through their employer, is not a lawful labor objective.

2. In an action by employer to enjoin picketing by union, its officers and members, where evidence established that objective of the union was to force plaintiffs' employees to join the union, a permanent injunction against picketing did not impose involuntary servitude upon the defendants or deprive them of freedom of speech and of property without due process.

The facts in the *Postma* case are identical with the facts in the case now before this Court, in that the union was picketing for the sole purpose of coercing the employer to force his employees to join the union as a condition of employment and to discharge those employees who would not join the union, and to force the employees to select the particular union as their bargaining agent.

In *Blue Boar Cafeteria, Inc.* v. *Hotel and Restaurant Employees and Bartenders Int'l Union, Local No. 181, et al*, decided in 1953 by the Court of Appeals of Kentucky (the court of last resort), it was decided that picketing in that case was in violation of the policy of Kentucky, and the picketing was permanently enjoined.

The facts in that case are identical with the facts in this case. In the *Blue Boar Cafeteria* case the union requested the employer to negotiate a contract with the union, which would require *Blue Boar* to force its employees to join the union as a condition of employment. None of *Blue Boar's* employees were members of the union, and had not been contacted by the union to join. There was no labor dispute between employer and employees, and the sole purpose of the picketing was to coerce employer to force his employees to join the union as a condition of employment. The Court of Appeals of Kentucky permanently enjoined picketing in the *Blue Boar* case.

James R. Bean, etc., appellant, v. *Local Union No. 698, etc., appellees,* which was decided by the Court of Appeals of the Ninth Judicial District of Ohio on July 1, 1953, being Cause No. 4368. This case follows the law as laid down by this Court and the Ohio Supreme Court and is in point with case before this Court. (*Opinion, James R. Bean, etc.* v. *Local Union No. 698, etc.*, Appendix, p. 21a).

Meadowbrook Homes, Inc. v. *International Hod Carriers, etc.*, 52 O. O. 168 (1953). (In this case the Honorable Charles S. Bell, Judge Court of Common Pleas and formerly a Judge of the Supreme Court of Ohio, stated at page 120 of the record of proceedings, "I can point out to you at least ten decisions in the State of Ohio that have followed *Crosby* v. *Rath*. That is the law as I understand it.") *Triton Co.* v. *United Brotherhood of Carpenters and Joiners of America (AFL)*, Ct. of Common Pleas, Hamilton County, Case No. A-148274 (1955); *Johnson Bros.* v. *Retail Clerks, Local 633, and Distribution and Warehouse Workers Local 22*, 51 O. O. 122 (1951); *Yakumithis* v. *Vending Machine Local 410T*, 51 O. O. 126 (1952); *Corn* v. *Childers, et al*, 25 Labor Cases par. 68, 426 (1954); *Settos* v. *Springfield, Ohio, Local 352, etc., et al*, 20 O. O. 161 (1940); app. den.

138 O. S. 40; 32 N. E. (2d) 22; Cert. Den. 314 U. S. 663; 86 L. E. 531 (1941).

Counsel for petitioners has cited the case of *Donofrio* v. *Bartenders & Culinary Workers Local No. 212 et al* and contends that this case is directly in point with the case before this Court (Petition, p. 20). This case is not in point with the present case.

In the opinion in the *Donofrio* case, in the first paragraph, the court found that: "No employee of the plaintiff, according to the evidence, has requested plaintiff either to approve or disapprove of his joining any union, there being no words or actions, so far as the record discloses, between the employees and the plaintiff dealing with the joining of any prospective union."

In the instant case all of respondents' employees were contacted by respondents. The employees refused to join the Union, and this evidence appears in the stipulation (Tr. p. 13). This, in and of itself, makes the case entirely different from the *Donofrio* case.

A thorough analysis of the decisions of all courts will disclose that there is presently no confusion in the law of Ohio with regard to the right to picket. The clear and positive answer to petitioners' arguments have been announced with finality in the foregoing cases. The Ohio Supreme Court followed and applied the law to the facts in the instant case, and in doing so it was clearly correct.

II.

THERE IS NO CONFLICT OF DECISION

In Ohio, if picketing violates the public policy, it is subject to restraint and is not in conflict with decisions in cases which control.

In February of 1941, this Court, in the case of *AFL* v. *Swing*, 312 U. S. 321, first held that picketing was free speech, and therefore took away from the state courts the right to limit the exercise of picketing.

On this same day that this Court handed down its decision in the *Swing* case, it also handed down a decision in the *Meadowmoor* case (312 U. S. 287), in which case this Court sustained an injunction forbidding all picketing because it had been "enmeshed with contemporaneous violent conduct".

On this same day the case of *Crosby* v. *Rath*, 136 O. S. 352, 25 N. E. 2d 934, was denied certiorari, in which *Crosby* case the Supreme Court of Ohio held that the union had demanded that plaintiff sign a contract which would have required her to discharge her employees unless they joined the union; that she told her employees to follow their own preference in this regard; that the union was permitted to solicit their membership; that none desired to join; that each was employed under a renewable, three-months, written contract. After the union's demand was refused, the union picketed her restaurant. Mrs. Crosby filed her petition for an injunction and a full and complete trial followed. The Supreme Court of Ohio sustained the injunction granted by the trial court in the *Crosby* case.

The *Swing* case, the *Meadowmoor* case and the *Crosby* case were before this Court at the same time, and on the same day decisions were handed down in the *Swing* case and the *Meadowmoor* case this Court denied certiorari in the *Crosby* case, and each concerned an injunction issued by a state court forbidding all picketing under their respective and varying facts.

After the doctrine expressed in the *Swing* case, there was a concerted resort to picketing under any and all circumstances as an absolute right under the constitutional right

of free speech. But after the decision in the *Swing* case, this Court decided several cases which indicated that the *Swing* case was not entitled to be given the broad scope extended to it by many state courts.

In *Hotel and Restaurant Workers Alliance* v. *Wisconsin Employment Relations Board*, 314 U. S. 590 (1942), the court sustained a Wisconsin order restraining all picketing because it was carried on in the absence of a majority strike vote, as required by the Wisconsin Peace Act.

In *Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations Board*, 315 U. S. 740 (1942), the court sustained a Wisconsin order enjoining inter alia picketing of employees' homes.

In *Bakery Drivers Union* v. *Wohl*, 315 U. S. 769 (1942), although reversing a New York Court injunction obtained by Vendor-Drivers against a union on a ground that the New York Court's decree had been based solely on the absence of "labor dispute", Justice Jackson pointed out in his decision that, "a state is not required to tolerate in all places in all circumstances, even peaceful picketing by an individual". 315 U. S. 775.

And Justice Douglas, in his concurring opinion, made the following statement: "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality, and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence, these aspects of picketing make it the subject of restrictive regulation." 315 U. S. at 776.

In the case of *Carpenters Union* v. *Ritters Cafe*, 315 U. S. 722 (1942), this Court made a further important distinction in the identification of picketing with that of freedom of speech. In this case *Ritter* operated a cafe under a contract with a restaurant union. He also owned a parcel of land some miles away on which he was erecting a building

through a contractor. Because he refused to require that the contractor employ only union labor in the building construction, the Carpenters' Union picketed his restaurant.

While in this case the picketing was admittedly peaceful, by only one picket at a time, nevertheless, this Court affirmed an injunction against all picketing at the restaurant, holding that no constitutional rights had thereby been infringed. The union relied on the *Swing* doctrine, that there is an absolute right to picket under all circumstances, based on the constitution right of freedom of speech.

This Court held: "That the circumstance that a labor dispute is the occasion of exercising freedom of expression does not give that freedom any greater constitutional sanction or render it completely inviolable." (P. 725).

The court also said in this case, "While the right of free speech is embodied in the liberty safeguarded by the due process clause, that clause postulates the authority of the states to translate into law local policies to promote the health, safety, morals and general welfare of its people * * *. The limits of this sovereign power must always be determined with appropriate regard to the particular subject of its exercise."

This Court also said in this case, "To deny the states the power to draw this line is to write into the Constitution the notice that every instance of peaceful picketing—anywhere and under any circumstances—is necessarily a phase of the controversy which provoked the picketing." (P. 728).

In the case of *Bakery Drivers* v. *Wagshal*, 333 U. S. 437, (1948), Mrs. Wagshal operated a delicatessen store. Because a driver employed by an outside bakery made deliveries to her store at an inconvenient hour, she changed bakeries. Thereupon, her store was boycotted and picketed. Although the peaceful picketing was admitted, the Court, in an opinion by Justice Frankfurter, concluded that there was no "labor controversy" under the Federal Anti-Injunc-

tion Act, and that the issuance of a decree against all picketing was, therefore, proper.

In the case of *Giboney* v. *Empire Storage*, 336 U. S. 490 (1949), this Court again distinguished picketing from freedom of speech. This case arose in the Missouri courts which had granted an injunction against all picketing.

The court's decision shows that in order to improve the wages and working conditions of its members employed by large distributors, the union attempted to organize the non-union "peddlers" of retail ice. Meeting with resistance on the part of the peddlers, the union devised a plan to secure agreements from the wholesale ice distributors under which they would not sell ice to non-union peddlers. One of these, the Empire Company, refused to sign such an agreement, whereupon it was peacefully picketed.

An injunction against all picketing was granted on the theory that the purpose of the picketing was unlawful, namely, to require Empire to violate the Missouri Anti-Trust Act.

Before this Court, the Union argued that the picketers "were attempting, peacefully, to publicize truthful facts about a labor dispute".

The Court called attention to its statements in the *Wohl* case, that: "Picketing by an organized group is more than free speech * * *", and that, "a state is not required to tolerate in all places * * * even peaceful picketing by an individual".

In the case of *Hughes et al* v. *Superior Court of California*, 339 U. S. 460, the petitioners, acting on behalf of a group of persons, demanded of a grocery store corporation in Richmond, California, an agreement that as its white clerks quit, negroes should be employed until the proportion of negro clerks to white clerks would be approximately the same as negro to white customers; namely, fifty per

cent each. Upon the employers' refusal, the store was picketed with "Don't patronize" placards.

The grocery corporation brought suit and injunction issued restraining picketing for that purpose, and upon the picketing continuing, the defendant court found the petitioners guilty of contempt. The Supreme Court of California sustained the lowwer court and this Court granted writ of certiorari.

The California Supreme Court found racial discrimination in employment to be contrary to the public policy of California.

The petitioners claimed that the order infringed their rights of freedom of speech as guaranteed by the due process clause of the 14th Amendment.

In the case of *International Brotherhood of Teamsters* v. *Hanke et al*, 339 U. S. 470, the plaintiffs respectively owned and performed all the work required in two automobile sales and repair establishments in Seattle, Washington. (Here is the same self-employer situation as in the case of *Senn* v. *Tile Layers Union*, 301 U. S. 468.)

They refused to operate as union members, or be governed by union rules.

Peaceful picketing ensued, with the pickets carrying placards stating: "Union people look for the union shop card", and in the sight of patrons, writing down their automobile license numbers.

The Washington statute provides that employees shall have full freedom of association, although free to decline to associate, and that they shall be free from coercion of employers in designation of representatives.

Therefore, while in the *Senn* case the public policy of Wisconsin, as declared by its own statute, permitted picketing of self-employers, the Washington courts found the purpose of such picketing to be contrary to the public policy of that state.

In the case of *Building Service Employees International Union et al* v. *Gazzam*, 339 U. S. 532, also coming from Washington, the employer operated a small hotel at Bremerton, Washington. None of his employees were members of the defendant union. Representatives of the union asked Gazzam to sign a contract requiring his employees to join the union. The employer replied that that was a matter for the employees to decide, and the union representative reported that after being solicited, the employees would not join. Picketing ensued, the hotel being placed on the union's "unfair to organized labor" list, one picket peacefully patrolling in front of the hotel.

The order in the *Gazzam* case forbids "endeavoring to compel plaintiff to coerce his employees to join the defendant union, or to designate defendant union as their representative, or for collective barganing, by picketing the hotel premises".

There is no conflict with applicable and controlling decisions of this Court in the lower court's ruling in the factual situation in the present case.

III.

THERE IS NO IMPORTANT QUESTION OF CONSTITUTIONAL LAW INVOLVED

The judgment of Ohio does not raise a new or important question of constitutional law which warrants granting of a writ of certiorari.

Petitioners rely entirely upon this Court's decision in *AFL* v. *Swing*, but since the decision in the *Swing* case there have been numerous decisions by this Court which held that the *Swing* case was not entitled to be given the broad scope extended to it by many state courts.

Where the public policy of the state regards picketing of the kind involved in the instant case as unlawful, a state court may enjoin such picketing without infringing upon the right of free speech guaranteed by the 14th Amendment to the Federal Constitution; and the fact that such public policy has been found by the courts of that state to be a part of its common law instead of being expressed by its legislature in statutory form is immaterial.

Every important constitutional question in connection with the instant case has been answered by this Court.

Thus in *Building Service Employers Int'l Union* v. *Gazzam, supra* (339 U. S. 532), it is said in this court's opinion:

> "This court has said that picketing is in part an exercise of the right of free speech guaranteed by the Federal Constitution. * * * But since picketing is more than speech and establishes a locus in quo that has far more potential for inducing action or nonaction than the message the pickets convey, this court has not hesitated to uphold a state's restraint of acts and conduct which are an abuse of the right to picket rather than a means of peaceful and truthful publicity. * * *
>
> "* * *
>
> "The state of Washington has by legislative enactment declared its public policy on the subject of organization of workers for barganing purposes. * * * Under the so-enunciated public policy of Washington, it is clear that workers * * * shall be free from the coercion, interference, or restraint of employers of labor in the designation of their representatives for collective bargaining. Picketing of an employer to compel him to coerce his employees' choice of a barganing representative is an attempt to induce a transgression of this policy, and the state here restrained the advocates of such transgression from further action with like aim. To judge the wisdom of such policy

is not for us; ours is but to determine whether a restraint of picketing in reliance on the policy is an unwarranted encroachment upon rights protected from state abridgment by the Fourteenth Amendment. * * * An adequate basis for the instant decree is the unlawful objective of the picketing, namely, coercion by the employer of the employees' selection of a bargaining representative. * * *

"* * *

"Here, as in Giboney, the union was using its economic power with that of its allies to compel respondent to abide by union policy rather than by the declared policy of the state. * * * If respondent had complied with petitioners' demands * * * he would have thereby coerced his employees. The employees would have had no free choice as to whether they wished to organize or what union would be their representative."

Also, in *Hughes* v. *Superior Court, supra* (339 U. S. 460), it is said in the court's opinion:

"* * * while picketing is a mode of communication it is inseparably something more and different. Industrial picketing 'is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.' * * * Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word. * * *

"* * * A state may constitutionally permit picketing despite the ingredients in it that differentiate it from speech in its ordinary context. * * * And we

have found that because of its element of communication picketing under some circumstances finds sanction in the Fourteenth Amendment. * * * However general or loose the language or opinions, the specific situations have controlled decision. It has been amply recognized that picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent. Picketing is not beyond the control of a state if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives ground for its disallowance. * * *

"* * * The fact that California's policy is expressed by the judicial organ of the state rather than by the Legislature we have repeatedly ruled to be immaterial. * * *

"It is not for this court to deny to a state the right, or even to question the desirability, of fitting its law 'to a concrete situation through the authority given * * * to its courts.' * * * It is particularly important to bear this in mind in regard to matters affecting industrial relations which, until recently, have 'been left largely to judicial lawmaking and not to legislation.' "

See also *Local Union No. 10* v. *Graham, supra* (345 U. S. 192); *International Brotherhood* v. *Hanke, supra* (339 U. S. 470); *Giboney* v. *Empire Storage & Ice Co., supra* (336 U. S. 490); and *Carpenters and Joiners Union* v. *Ritter's Cafe, supra* (315 U. S. 722).

Petitioners contend that *Crosby* v. *Rath* not only did not stand for any widely-accepted public policy, but its holding was confused and limited by this Court's decision in *AFL* v. *Swing* and subsequent cases. Petitioners further contend that this confusion in *Crosby* v. *Rath* was apparently settled by the Supreme Court of Ohio in the case of *Grimes & Hauer, Inc.* v. *Pollock*, 163 O. S. 372, 127 NE 2d 203, decided on May 25, 1955, approximately five months before the decision in the instant case.

In answer to this contention by petitioners, which argument was also presented to the Supreme Court of Ohio in this case, we cite from the opinion of the Supreme Court in this case by Taft, J.:

> "It is argued that this court in Grimes & Hauer, Inc. v. Pollock, 163 Ohio St., 372, 127 N. E. (2d), 203, not only held that the public policy of Ohio does not oppose union shop agreements, but also questioned the reasons it had given for the Crosby case decision. There are statements in the opinion, but not in the syllabus, which might lend support to such conclusions. Those statements were made in answer to the contention that, because of Section 164 (b), Title 29, U. S. Code, and because the common-law public policy of Ohio in effect establishes a 'right to work' law, the state court could enjoin the picketing involved in that case. However, even if there had been a statutory 'right to work' law in Ohio, the only effect of Section 164 (b), Title 29, U. S. Code, would have been to prevent the National Labor Relations Board from acting in disregard of that law, as, for example, in authorizing execution or application of a union shop agreement. As this court recognized in the syllabus of the Grimes & Hauer case, the plaintiff therein was entitled to relief under provisions of the Labor Management Relations Act. Therefore the denial to Ohio of the right to enjoin the picketing in the Grimes & Hauer case (a denial implied by reason of the doctrine of pre-emption announced in Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776, 346 U. S., 485, 98 L. Ed., 228, 74 S. Ct., 161) would not, to use the words of Section 164 (b), be 'authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment.' "

The decision of the Supreme Court of Ohio in *Grimes & Hauer, Inc.* v. *Pollock* was predicated upon the fact that the plaintiffs in that case were engaged in interstate com-

merce and the courts of Ohio had no jurisdiction, since jurisdiction in such cases involving interstate commerce rested exclusively with the National Labor Relations Board.

The decision of the Supreme Court of Ohio, based on the evidence in this case and following applicable decisions of this Court, was correct and there is no important question of constitutional law that warrants a review on certiorari.

CONCLUSION

The decision below is correct and represents neither a conflict of decisions nor any substantial question warranting review.

It is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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CHESTER P. FITCH,
LEE O. FITCH,
OF COUNSEL.

APPENDIX

SUPREME COURT OF OHIO

HARRY CHUCALES, GUS CHUCALES AND LULA CHUCALES, dba "State Bar and Grill,"

Plaintiffs-Appellees,

vs.

WILLIAM O. ROYALTY, GEORGE SLAUGHTER AND LOCAL NO. 429 OF THE HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION,

Defendants-Appellants.

ENTRY AFFIRMING COURT OF APPEALS

Journal No. 41, page 605. Wednesday, October 26, 1955.

APPEAL FROM THE COURT OF APPEALS OF SCIOTO COUNTY

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Scioto County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the same is hereby, affirmed; and it appearing to the Court that there were reasonable grounds for this appeal it is ordered that no penalty be assessed herein.

It is further ordered that the appellees recover from the appellants their costs herein expended taxed at $.....

ORDERED, That a special mandate be sent to the Court of Common Pleas of Scioto County, to carry this Judgment into Execution.

ORDERED, That a copy of this entry be certified to the Clerk of the Court of Appeals of Scioto County, "for entry".

OPINION OF SUPREME COURT OF OHIO

(Caption)

OPINION: TAFT, JUDGE

Defendants complain that the judgment of the Court of Appeals was based upon its finding that the picketing was for the purpose of bringing pressure upon plaintiffs to compel their employees to join the defendant union but that the petition contains no allegation with respect to any such purpose. We believe that the power of this court, with respect to amendments to pleadings (Section 2309.58, Revised Code), and the directions of the General Assembly, with respect to disregarding defects in pleadings not affecting substantial rights of the adverse party (Section 2309.59, Revised Code), are such that we are not justified in setting aside the judgment of the Court of Appeals in the instant case merely because the petition fails to specify the unlawful purpose of the picketing. The petition does allege that the picketing was unlawful, no motion to make it definite and certain was filed, no demurrer thereto was filed, and defendants were apparently not misled by such failure to specify the unlawful purpose of the picketing.

Defendants also complain because the agreed statement of facts does not include, as one of the agreed "facts upon which" the Court of Appeals "should consider" the appeal, that the picketing was for any such purpose. However, where parties agree that certain facts are "the facts upon which" the "court should consider" a case, the court, in

deciding such case, may quite properly base its decision in part upon other facts that may reasonably be inferred from the facts agreed upon.

In view of the facts agreed upon in the instant case, the Court of Appeals could hardly have found that there was any purpose for the picketing except the purpose of pressuring plaintiffs to compel their employees to join the defendant union. Although the wording of the signs used in the picketing tends to show that the only thing defendants were interested in was getting plaintiffs' employees into the union, plaintiffs had not objected to defendants' talking to plaintiffs' employees about joining the union and had even suggested that defendants do so. Especially before defendants had taken advantage of this opportunity to talk with plaintiffs' employees, there would appear to be no apparent reason for defendants to picket in order merely to pressure or to persuade those employees to join the defendant union. It is quite clear from the facts agreed upon that the purpose of the picketing was to conscript plaintiffs, or to pressure plaintiffs into volunteering, as allies of defendants in pressuring plaintiffs' employees to join defendant union.

In order to compel their employees to join defendant union, it would be necessary for plaintiffs to discharge employees unless they joined that union. In effect, therefore, defendants' purpose of pressuring plaintiffs to compel their employees to join the defendant union amounted to a purpose of pressuring plaintiffs to discharge their employees unless they joined that union.

We have, therefore, in the instant case, peaceful picketing against an employer, conducted on the sidewalk in front of the employer's premises by persons who were never employed by that employer and who do not represent anyone who ever was, and conducted for the purpose of pressuring

the employer to discharge his employees unless they join the union of those who are conducting the picketing.

After the decision in *American Federation of Labor* v. *Swing*, 312 U. S., 321, 85 L. Ed., 855, 61 S. Ct., 568, there was certainly room for doubt as to whether a state court could enjoin such picketing without conflicting with the right to free speech guaranteed by the federal Constitution. See also *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468, 81 L. Ed., 1229, 57 S. Ct., 857; *Thornhill* v. *Alabama*, 310 U. S., 88, 84 L. Ed., 1093, 60 S. Ct. 736; *Carlson* v. *California*, 310 U. S., 106, 84 L. Ed., 1104, 60 S. Ct., 746. But cf. *Valentine* v. *Christensen*, 316 U. S., 52, 86 L. Ed., 1262, holding that a state may prohibit use of its streets for distribution of advertising material.

Since the decision in the *Swing* case, the problems, with respect to infringement of the right of free speech by injunctions against picketing, have been considered in numerous decisions by the United States Supreme Court and by state courts of last resort, and have also been the subject of a considerable body of other legal literature. See for example *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S., 287, 85 L. Ed., 836, 61 S. Ct., 552; *Carpenters and Joiners Union of America* v. *Ritter's Cafe*, 315 U. S., 722, 86 L. Ed., 1143, 62 S. Ct., 807; *Bakery & Pastry Drivers & Helpers Local 802* v. *Wohl*, 315 U. S., 769, 86 L. Ed., 1178, 62 S. Ct., 816; *Cafeteria Employees Union* v. *Angelos*, 320 U. S., 293, 88 L. Ed., 58, 64 S. Ct., 126; *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S., 490, 93 L. Ed., 834, 69 S. Ct., 684; *Building Service Employers International Union* v. *Gazzam*, 339 U. S., 532, 94 L. Ed., 1045, 70 S. Ct., 784; *Hughes* v. *Superior Court*, 339 U. S. 460, 94 L. Ed., 985, 70 S. Ct., 718; *International Brotherhood of Teamsters* v. *Hanke*, 339 U. S. 470, 94 L. Ed., 995, 70 S. Ct., 773, 13 A.L.R. (2d), 631; *Local Union No.*

10 v. *Graham*, 345 U. S., 192, 97 L. Ed., 946, 73 S. Ct., 585; annotations at 11 A.L.R. (2d), 1338; 93 L. Ed., 1151, 1186 et seq.; 94 L. Ed., 973, 975 et seq.; *Teller, Picketing and Free Speech*, 56 Harvard Law Review, 180; *Dodd, Picketing and Free Speech: A Dissent*, 56 Harvard Law Review, 513; *Teller, Picketing and Free Speech: A Reply*, 56 Harvard Law Review, 532; *Jaffe, In Defense of the Supreme Court's Picketing Doctrine*, 41 Michigan Law Review (1943), 1037.

As a result, it may fairly be said that it is difficult to rescue the principles of law decided from the ocean of words in which they are submerged. For this reason, and because many of these cases were recently reviewed by Judge Hart in his opinion in *W. E. Anderson Sons Co.* v. *Local Union No. 311*, 156 Ohio St., 541, 104 N. E. (2d), 22, we will merely state our conclusions as to the principles of law which have in our opinion now been established by the decisions of the Supreme Court of the United States, to the extent that those principles indicate whether or not the injunction against picketing in the instant case conflicts with the right to free speech guaranteed by the federal Constitution; and we will quote briefly some of the reasoning which was used in those decisions and which we believe supports our conclusions.

In our opinion, where the public policy of a state regards picketing of the kind involved in the instant case as unlawful, a state court may enjoin such picketing without infringing the right of free speech guaranteed by the Fourteenth Amendment to the federal Constitution; and the fact, that such public policy has been found by the courts of that state to be a part of its common law instead of being expressed by its Legislature in statutory form, is immaterial.

Thus in *Building Service Employers Intl. Union* v. *Gazzam, supra* (339 U. S., 532), it is said in the court's opinion:

"This court has said that picketing is in part an exercise of the right of free speech guaranteed by the federal Constitution. * * * But since picketing is more than speech and establishes a *locus in quo* that has far more potential for inducing action or non-action than the message the pickets convey, this court has not hesitated to uphold a state's restraint of acts and conduct which are an abuse of the right to picket rather than a means of peaceful and truthful publicity. * * *

"* * *

"The state of Washington has by legislative enactment declared its public policy on the subject of organization of workers for bargaining purposes. * * * Under the so-enunciated public policy of Washington, it is clear that workers * * * shall be free from the coercion, interference, or restraint of *employers of labor* in the designation of their representatives for collective bargainin. Picketing of an employer to compel him to coerce his employees' choice of a bargaining representative is an attempt to induce a transgression of this policy, and the state here restrained the advocates of such transgression from further action with like aim. To judge the wisdom of such policy is not for us; ours is but to determine whether a restraint of picketing in reliance on the policy is an unwarranted encroachment upon rights protected from state abridgment by the Fourteenth Amendment.

"* * * An adequate basis for the instant decree is the unlawful objective of the picketing, namely, coercion by the employer of the employees' selection of a bargaining representative. * * *

"* * *

"Here, as in Giboney, the union was using its economic power with that of its allies to compel respondent to abide by union policy rather than by the declared policy of the state. * * * If respondent had complied with petitioners' demands * * * he would have thereby coerced his employees. The employees would have had no free choice as to whether

they wished to organize or what union would be their representative."

Also, in *Hughes* v. *Superior Court, supra* (339 U. S., 460), it is said in the court's opinion:

"* * * while picketing is a mode of communication it is inseparably something more and different. Industrial picketing 'is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.' * * * Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word. * * *

"* * * A state may constitutionally permit picketing despite the ingredients in it that differentiate it from speech in its ordinary context. * * * And we have found that because of its element of communication picketing under some circumstances finds sanction in the Fourteenth Amendment. * * * However general or loose the language or opinions, the specific situations have controlled decision. It has been amply recognized that picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent. Picketing is not beyond the control of a state if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives ground for its disallowance. * * *

"* * * The fact that California's policy is expressed by the judicial organ of the state rather than by the Legislature we have repeatedly ruled to be immaterial. * * *

"It is not for this court to deny to a state the right, or even to question the desirability, of fitting its law

'to a concrete situation through the authority given * * * to its courts.' * * * It is particularly important to bear this in mind in regard to matters affecting industrial relations which, until recently, have 'been left largely to judicial lawmaking and not to legislation.' "

See also *Local Union No. 10* v. *Graham, supra* (345 U. S.. 192); *International Brotherhood* v. *Hanke, supra* (339 U. S., 470); *Giboney* v. *Empire Storage & Ice Co., supra* (336 U. S., 490); and *Carpenters and Joiners Union* v. *Ritter's Cafe, supra* (315 U. S., 722).

The question remains whether the public policy of Ohio regards picketing of the kind involved in the instant case as unlawful. It has not been argued and we will not therefore consider whether such picketing is forbidden by the provisions of Section 1331.01 et seq., Revised Code. In our opinion, picketing of the kind involved in the instant case is and will continue to be unlawful in Ohio until legislation making it lawful is adopted.

In the instant case, defendants by their picketing were endeavoring to advance their interests. This effort of defendants necessarily conflicted with the interests of plaintiffs in avoiding interference with their business and with the interests of plaintiffs' employees in avoiding interference with their jobs. Furthermore, it conflicted with the public interest in avoiding industrial strife. There is nothing in the record to show what interests of defendants will be advanced by this picketing other than their interest in getting additional members for their union. For example, there is not even any evidence that, because of such things as payment of low wages or long hours of employment, plaintiffs are enjoying a competitive advantage over others, who are engaged in the same business and are maintaining union standards and employing those whom

defendants represent. Under such circumstances, Ohio is certainly reasonable in determining that it is against its public policy to permit the use of its streets and sidewalks (dedicated and opened to facilitate public travel and transportation. *Railway Co.* v. *Telegraph Assn.*, 48 Ohio St., 390, 27 N. E., 890, 29 Am. St. Rep., 559, 12 L.R.A., 534; *Callen* v. *Columbus Edison Electric Light Co.*, 66 Ohio St., 166, 180, 64 N.E., 141, 58 L.R.A., 782) to stir up industrial strife that does not exist and for the existence of which there is no apparent reason.

In our opinion, the holding of this court in *Crosby* v. *Rath*, 136 Ohio St., 352, 25 N. E. (2d), 934, requires the conclusion that the picketing involved in the instant case was unlawful and should be enjoined. It is true that the decision in the *Crosby* case might have been based upon the fact that the picketing involved in that case had been accompanied by violence. However, the opinion "by the court" does not base the decision upon that ground but upon the ground that picketing is unlawful where there is no dispute between the employer and his employees and where the picketing is conducted against the employer by persons having no connection with his employees and where it is conducted for the purpose of pressuring the employer to discharge his employees unless they become members of a union. Thus, in that case, this court reversed that part of the judgment of the Court of Appeals which had permitted picketing and boycotting and, in doing so, stated in an opinion "by the court":

> "• • • it is not even contended that in the instant case there is any dispute whatsoever between the plaintiff and her employees • • •. On the contrary, the only dispute in the instant case is between the plaintiff and the defendants with whom the plaintiff's employees have no connection. The thing upon which the defendants are insisting is that the plaintiff dis-

> charge her employees unless they become members of one of the defendant unions. There is no reason or convincing authority sustaining the contention of the defendants that they have the right to engage in picketing or boycotting under such circumstances. * * * this must be the law * * * the instant situation is concededly unaffected by statute."

It is argued that this court in *Grimes & Hauer, Inc.*, v. *Pollock,* 163 Ohio St., 372, 127 N. E. (2d), 203, not only held that the public policy of Ohio does not oppose union shop agreements, but also questioned the reasons it had given for the *Crosby* case decision. There are statements in the opinion, *but not in the syllabus,* which might lend support to such conclusions. Those statements were made in answer to the contention that, because of Section 164(b), Title 29, U. S. Code, and because the common-law public policy of Ohio in effect establishes a "right to work" law, the state court could enjoin the picketing involved in that case. However, even if there had been a statutory "right to work" law in Ohio, the only effect of Section 164(b), Title 29, U. S. Code, would have been to prevent the National Labor Relations Board from acting in disregard of that law, as, for example, in authorizing execution or application of a union shop agreement. As this court recognized in the syllabus of the *Grimes & Hauer* case, the plaintiff therein was entitled to relief under provisions of the Labor Management Relations Act. Therefore the denial to Ohio of the right to enjoin the picketing in the *Grimes & Hauer* case (a denial implied by reason of the doctrine of pre-emption announced in *Garner* v. *Teamsters, Chauffeurs & Helpers Local Union No. 776,* 346 U. S., 485, 98 L. Ed., 228, 74 S. Ct., 161) would not, to use the words of Section 164(b), be "authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment."

However, in our opinion, it is not necessary to determine and we do not determine in the instant case whether there is in Ohio, apart from any statutory or constitutional provision therefor, any common-law public policy which in effect establishes a "right to work" law. Assuming that there is no such common-law public policy in Ohio, the common-law public policy of Ohio may still regard peaceful picketing as unlawful where there is no dispute between the employer and his employees and where the picketing is conducted against the employer by persons who were never employed by him and who do not represent anyone that ever was so employed and where it is conducted for the purpose of pressuring the employer to compel his employees to become members of a union. As hereinbefore pointed out, it does; and an injunction against such picketing does not infringe upon the right to free speech guaranteed by the federal Constitution. In our opinion, the Fourteenth Amendment to the federal Constitution does not require a state to prohibit voluntary acquiescence in the demands of a union in order that such state may prohibit the union from exerting pressure by picketing to secure submission to such demands. Thus, it is said in the court's opinion in *International Brotherhood* v. *Hanke, supra* (339 U. S., 470):

> "Nor does the Fourteenth Amendment require prohibition by Washington also of voluntary acquiescence in the demands of the union in order that it may choose to prohibit the right to secure submission through picketing. In abstaining from interference with such voluntary agreements a state may rely on self-interest. In any event, it is not for this court to question a state's judgment in regulating only where an evil seems to get most conspicuous."

Also, in *Hughes* v. *Superior Court, supra* (339 U. S., 460), it is said in the court's opinion:

> "If because of the compulsive features inherent in picketing, beyond the aspect of mere communication as an appeal to reason, a state chooses to enjoin picketing to secure submission to a demand for employment proportional to the racial origin of the then customers of a business, it need not forbid the employer to adopt such a quota system of his own free will."

Since there is no claim that plaintiffs in the instant case were engaged in interstate commerce, the decisions in *Grimes & Hauer, Inc.*, v. *Pollock, supra,* and *Garner* v. *Teamsters, Chauffeurs & Helpers Local No. 776, supra,* are not applicable.

Judgment affirmed.

WEYGANDT, C.J., MATTHIAS, HART, STEWART and BELL, JJ., concur.

OPINION: ZIMMERMAN, J., DISSENTING.

As I view the matter, the vital question in this case, under the facts presented, is relatively simple. That question is, where no dispute exists between an employer and his non-union employees, may members of a labor union who are directly interested picket and banner the employer's premises in a quiet and orderly manner to induce unionization by publicizing the status of the employer's establishment after negotiations for unionization have failed?

There is neither a constitutional provision nor any statutory law in Ohio which prohibits such activities, and I can not agree with my associates that "the public policy of Ohio, as determined by its courts, regards picketing against an employer as unlawful where there is no dispute between the employer and his employees and where the picketing is conducted by persons who were never employed by that employer * * *."

In the case of *Crosby* v. *Rath*, 136 Ohio St., 352, 25 N. E. (2d), 934, relied on in the majority opinion as establishing such public policy, violence and intimidation accompanied the picketing. And the case of *W. E. Anderson Sons Co.* v. *Local Union No. 311*, 156 Ohio St., 541, 104 N. E. (2d) 22, was decided mainly on the ground that the picketing there constituted an unlawful "secondary boycott."

It seems to me that the question stated above requires an affirmative answer under the decision of the Supreme Court of the United States in *American Federation of Labor* v. *Swing*, 312 U. S., 321, 85 L. Ed., 855, 61 S. Ct., 568.

There, as stated in the opinion, the precise issue was:

> "Is the constitutional guaranty of freedom of discussion infringed by the common-law policy of a state forbidding resort to peaceful persuasion through picketing merely because there is no immediate employer-employee dispute?"

The court answered that question in the affirmative and said in the course of the opinion:

> "A state can not exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace. * * * The right of free communication can not therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ. Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in Thornhill's case (Thornhill v.

> Alabama, 310 U. S., 88, 84 L. Ed., 1093, 60 S. Ct., 736). 'Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the federal Constitution.' Senn v. Tile Layers Protective Union, 301 U. S., 468, 478 (81 L. Ed., 1229, 1236, 57 S. Ct., 857)."

The *Swing* case has never been expressly overruled, nor do I find in later cases that the principle announced in that case has been abandoned or modified in any essential respect.

In my view, the majority opinion proceeds on an erroneous basis and reaches an erroneous conclusion, with the result that appellants are denied the exercise of a constitutional right.

I would, therefore, reverse the judgment of the Court of Appeals and remand the cause to that court with instructions to dissolve the injunction and enter judgment for the appellants.

OPINION OF COURT OF APPEALS

No. 616

(Filed June 30, 1954.)

(CAPTION)

APPEAL ON QUESTIONS OF LAW AND FACT

BY THE COURT:

This appeal was presented in this Court on an agreed statement of facts from which the defendants-appellants conclude in their reply brief that the sole question presented to this Court is as follows:

> "Does the union have the right to engage in peaceful picketing when none of plaintiffs' employees are members of defendant union?"

The important portions of the agreed statement of facts set forth that the plaintiffs are doing business as State Bar and Grill at 603 Chillicothe Street in the city of Portsmouth, Ohio, a restaurant business catering to the general public, and employing therein persons who were not members of the defendants-appellants union and at all times they advised their employers that they did not wish to become members of the Union; the defendant-appellant Local No. 429 is a labor organization and an unincorporated association affiliated with the Hotel and Restaurant Employees and Bartenders International Union, which is in turn affiliated with the American Federation of Labor; and said Local No. 429 is composed of persons employed in the hotel, restaurant and bar industries in Scioto County, Ohio; that William O. Royalty is the acting secretary of the local, and George Slaughter is the acting agent of the local union.

Before picketing this place of business each time Harry Chucales was approached by either Royalty or Slaughter, Chucales advised them to take the matter up with their employees. Both Royalty and Slaughter were requesting that the plaintiffs-appellees commence negotiations with the Union for a Union contract, and Slaughter on the 28th day of January, 1953, asked Harry Chucales if he was going to run a union place, and requested that he enter into a contract with Local 429, whereupon Chucales told Slaughter to talk with the employees of the restaurant and determine from them whether or not they desired to join the union. Slaughter did not contact the employees, but within an hour picketing was commenced on the sidewalk in front of the State Bar and Grill, consisting of one picket, the picketing was peaceful and the picket carried a sign stating "This place does not employ members of Bartenders, Hotel and Restaurant Employees and Miscellaneous Workers Local No. 429, American Federation of Labor." The

picket was a member of Local 429 but not an employee of the plaintiffs-appellees. After picketing started, upon being approached by Gus Chucales, each employee of the State Bar and Grill stated that they were not members of Local No. 429 and did not desire to join Local No. 429.

Under these circumstances, there can be no doubt that the picketing in this case was conducted for the sole purpose of union organization of the plaintiffs-appellees' place of business. From the banner or sign carried by the picket, the purpose of the organization was that the plaintiffs-appellees employ members of the defendant union. This could only be accomplished under the circumstances of this case in two manners: First, – for the present employees of the plaintiffs-appellees to join the defendant union, or Second, – for them to be discharged and for the plaintiffs-appellees to employ employees who had such membership.

The defendants-appellants cannot escape these conclusions under their particular efforts of organization through employer negotiations. For this reason this case falls squarely within the pronouncement of the Supreme Court of the State of Ohio in the case of *Crosby* v. *Rath,* 136 Ohio State 352. Picketing or bannering, for the purpose of bringing pressure upon an employer to compel his employees to join a union, is for an illegal purpose and will be enjoined. The case of *Bean, appellant,* v. *Local No. 698, et al, appellees,* Ohio Appellate Reports, Vol. 94, Page 361, is decisive of this case. It would serve no useful purpose for this Court to further discuss the law of the case with comments on United States Supreme Court decisions and State of Ohio Supreme Court decisions, noting either distinctions of, or exceptions from, the principles of law contained therein.

Judgment for plaintiffs-appellees.

GILLEN, P.J., McCURDY and COLLIER, JJ., concur.

Dated June 29th, 1954.

OPINION OF COURT OF COMMON PLEAS

No. 40807

(Filed, Court of Common Pleas, Scioto County, September 23, 1953.)
(Filed, Court of Appeals, Scioto County, October 28, 1953.)
(Filed, The Supreme Court of Ohio, August 25, 1954.)

(CAPTION)

The facts in this case are embodied in a brief stipulation of facts, such that a further recitation thereof is unnecessary in this opinion.

Defendants' brief would indicate that there is only one question before the Court, which it sets forth on page 4 as follows: "Does a union have the right to engage in peaceful picketing when none of plaintiffs' employees are members of the defendant union?"

Defendants would have the Court believe that its only "purpose of the picketing was to inform the public that plaintiffs' establishment was not a union establishment and that plaintiffs did not employ members of the defendant local union; so that members of the public, sympathetic to organized labor would, knowing the facts, patronize establishments which were union establishments and which employed members of the defendant union."

If that were the case, then there would be no need for defendants' agent to contact plaintiffs to seek them to enter into a contract. Defendants' agent, however, did seek negotiations for a contract with defendant union. This plainly was not to carry out the purpose of advertising, but by entering into a contract, the result would be to force or coerce plaintiffs' employees to join a union. It is plain that plaintiffs are not allowed to coerce their employees in any way.

Public policy was originally laid down for Ohio in the case of *Crosby* v. *Rath*, which held that peaceful picketing

or bannering for the purpose of bringing pressure upon an employer to compel his employees to join a union is for an illegal purpose and will be enjoined.

This public policy has been followed by the Ohio Supreme Court in the case of *W. E. Anderson Sons Company* v. *Local Union No. 311* since the decision of the United States Supreme Court on May 8, 1950.

See also the decision of the Court of Appeals of the Ninth Judicial District of Ohio in the case of *Bean* v. *Local Union No. 698* dated July 1, 1953.

Quoting the *Bean* case, "The sole question for determination here is this: May a union in the absence of a dispute between employer and employees, or between the union and the employer or employees, engage in peaceful picketing for the purpose of bringing pressure to bear upon the employer to require his employees to join a union? In other words, may peaceful picketing for organizational purposes of the union be lawfully conducted?

"We think the question stated has been completed answered in the negative by the decision of *Crosby* v. *Rath*."

An injunction, as prayed for, may issue. An entry may be drawn accordingly.

/s/ HARLEY MEYER,
Judge, Sitting by Assignment

AGREED STATEMENT OF FACTS

(CAPTION)

Now come plaintiffs-appellees by their counsel and defendants-appellants by their counsel and submit to this Court the following agreed statement of facts in this appeal on questions of fact and law:

It is stipulated and agreed by and between counsel for plaintiffs-appellees and counsel for defendants-appellants

that plaintiffs-appellees are a partnership composed of Harry Chucales, Gus Chucales and Lula Chucales, doing business as the State Bar and Grill at 603 Chillicothe Street, in the City of Portsmouth, Ohio, a restaurant business catering to the general public in the operation of their business.

It is stipulated by and between counsel for plaintiffs-appellees and defendants-appellants that defendant-appellant, Local No. 429, is a labor organization and an unincorporated association affiliated with the Hotel and Restaurant Employees and Bartenders International Union, which is in turn affiliated with the American Federation of Labor. Defendant-appellant, Local 429, is composed of persons employed in the Hotel, Restaurant, and Bar industries in the County of Scioto, State of Ohio.

It is stipulated by and between counsel for plaintiffs-appellees and counsel for defendants-appellants, that defendant-appellant, William O. Royalty, is the acting secretary of defendant-appellant, Local No. 429.

It is further stipulated that on one occasion, prior to January 28, 1953, defendant-appellant, William O. Royalty, acting as agent of Local No. 429, approached plaintiff-appellee, Harry Chucales, and requested that plaintiffs- appellees commence negotiations with defendant-appellant, Local No. 429, for a union contract; that plaintiffs-appellees refused; that plaintiff-appellee, Harry Chucales, told plaintiff-appellant, William O. Royalty, to take the matter up with his employees.

It is further stipulated that on another occasion prior to January 28, 1953, defendant-appellant, William O. Royalty, casually reminded plaintiff-appellee, Harry Chucales, of this request but there was no extended discussion of the matter.

It is further stipulated that at all times mentioned in the petition and answer, no employees of plaintiffs-appel-

lees were members of defendant-appellant, Local No. 429.

It is further stipulated that on the 28th day of January, 1953, George Slaughter, defendant-appellant herein, acting as agent of defendant-appellant, Local No. 429, approached plaintiff-appellee, Harry Chucales, and asked him if he was going to run a union place and requested that he enter into a contract with the defendant-appellant, Local No. 429, and that plaintiff-appellee, Harry Chucales, told the defendant-appellant, George Slaughter, to talk with his employees as to whether or not they desired to join the union and that the said George Slaughter did not contact the employees of plaintiffs-appellees' establishment requesting them to join the union, Local No. 429, but left the plaintiffs-appellees' establishment, and within an hour thereafter, the picketing described hereafter commenced.

It is further stipulated that on the 28th day of January, 1953, defendant-appellant, Local No. 429, commenced picketing on the sidewalk in front of the said State Bar and Grill. Said picketing consisted of one picket at a time. Said picketing was peaceful. The picket carried a sign stating "This place does not employ members of Bartenders, Hotel and Restaurant Employees and Miscellaneous Workers Local No. 429, American Federation of Labor."

It is further stipulated and agreed that the defendants-appellants, or any agent of Local No. 429 of the Hotel & Restaurant and Bartenders Union, at no time approached the employees of plaintiffs-appellees, requesting them to join the defendant-appellant union, Local No. 429.

It is further stipulated that on the 28th day of January, 1953, shortly after the picketing started, the plaintiff-appellee, Gus Chucales, approached each of the employees of the State Bar and Grill and asked each employee if he or she was a member of the defendant-appellant, Local No. 429, or if they desired to join Local No. 429. Each employee replied in the negative to both questions.

It is further stipulated that the picket who carried the above described banner in front of plaintiffs-appellees' establishment, at no time mentioned herein was an employee of plaintiffs-appellees; said picket, however, was a member at all times herein mentioned of Local No. 429.

It is further stipulated that this agreed statement of facts are the facts upon which this Court should consider this appeal.

OPINION

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO)
) ss.
SUMMIT COUNTY)

JAMES R. BEAN, ETC.,
Appellant,

vs.

LOCAL UNION NO. 698, ETC., ET AL,
Appellees.

No. 4368

Argued June 24, 1953.
Decided July 1, 1953.

APPEAL ON QUESTIONS OF LAW

STEVENS, J.

Plaintiff brought an action in the Court of Common Pleas as an individual and on behalf of all other employees of Bill and Frank's Food Market in Barberton, Ohio, wherein was

sought an injunction against defendants from picketing plaintiff's employer's place of business.

The answer of defendants was in effect a general denial.

Trial to the court resulted in a judgment for defendants, from which judgment this appeal on questions of law has been perfected.

There are presented two assignments of error:

"1. The finding, judgment and order of the court are against the weight of the evidence and contrary thereto.

"2. The finding, judgment and order of the court are contrary to law."

This court heretofore, in the cases of *Smith and Gerhart, Inc.*, v. *Retail Clerks' Int. Protective Assn., et al., No. 1034*, Lorain County (unreported), and *Iacomini's Restaurant, Inc.*, v. *Hotel & Restaurant Employees & Bartenders Local No. 118, et al.*, 63 Abs. 258, has taken the position that, because of the decisions of the Supreme Court of the United State in *Milk Wagon Drivers, etc.*, v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, and *A. F. of L.* v. *Swing*, 312 U. S. 321, where there was no dispute between the employer and his employees, nor between employer, or employees, and the union, still a labor dispute could be created between the employer and the union, under the claim of protection of the right of free speech, which gave the union the right to peacefully picket the employer's place of business.

It undoubtedly was under these decisions that the trial court reached the conclusion from which this appeal has been taken.

More recently, however, the Supreme Court of the United States appears to have experienced a change of mind on the question of the paramount sanctity of the constitutional guaranty of the right of free speech, so far as unions are concerned.

As expressed by the Supreme Court of Ohio in *W. E.*

Anderson Sons Co. v. *Local Union No. 311, etc.*, 156 O. S. 541 (at p. 556):

> "Suddenly, the view of the federal Supreme Court seemed to change to a recognition of rights in certain instances which would warrant an injunction against picketing or bannering notwithstanding the constitutional protection of free speech. On May 8, 1950, the Supreme Court decided three cases, Building Service Employees Intl. Union, Local 262, v. Gazzam, 339 U. S., 532, 94 L. Ed., 1045, 70 S. Ct. 784; Hughes v. Superior Court, 339 U. S., 460, 94 L. Ed., 985, 70 S. Ct. 718; International Brotherhood of Teamsters Union, Local 309, v. Hanke, 339 U. S., 470, 94 L. Ed., 995, 70 S. Ct., 773, which dealt with vital phases of this question and which indicated a distinct departure from the view taken in the Senn, Thornhill and Carlson cases."

The court then announced the following conclusion (at p. 561):

> "Court decisions now seem to firmly establish the rule that picketing or bannering as a means of the exercise of the right of free speech will be afforded constitutional protection so long as it is lawfully conducted, but if it becomes unlawful then it falls within the category of a civil wrong and must be governed by the law of torts. In other words, the constitutional guaranty of the right of free speech is predicated upon the lawful exercise of such right and if, through conspiracy or unlawful conduct, the result of its exercise unlawfully injures another in his property rights, the guaranty ceases and the exercise of the claimed right by such means may be enjoined or prohibited."

In *Crosby* v. *Rath*, 136 O. S. 352, the court held that peaceful picketing or bannering for the purpose of bringing pressure upon an employer to compel his employees

to join a union, is for an illegal purpose and will be enjoined.

The public policy of Ohio has been determined by the above pronouncements of the Supreme Court of Ohio, and such determination accords with the rule announced by the Supreme Court of the United States in *Hughes* v. *Superior Court,* 339 U. S. 463, 94 L. Ed. 985, headnote 10, and *International Brotherhood, etc.,* v. *Hanke,* 339 U. S. 470, 94 L. Ed. 995, headnote 5.

The above decisions make it necessary to overrule and abandon the position previously taken by this court in the *Smith* and *Gerhart* and *Iacomini* cases, *supra.*

The sole question for determination here is this: May a union, in the absence of a dispute between employer and employees, or between the union and the employer or employees, engage in peaceful picketing for the purpose of bringing pressure to bear upon the employer to require his employees to join the union? In other words, may peaceful picketing for organizational purposes of the union be lawfully conducted?

We think the question stated has been completely answered in the negative by the decision in *Crosby* v. *Rath, supra.*

It is therefore the conclusion of this court that the trial court prejudicially erred when it dismissed plaintiff's petition, and denied the relief sought therein.

The judgment is reversed as contrary to law, and, there being no dispute in the evidence, this court will enter the judgment which the trial court should have entered.

An injunction as prayed for in the petition may issue.

Judgment for appellant.

DOYLE, P.J., and HUNSICKER, J., concur.